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IN THE

Supreme Court of the United States

No. 60

OSCAR L. CHAPMAN,* *Petitioner*, c/o Department of Interior Building,

v.

SHERIDAN-WYOMING COAL COMPANY, INC., *Respondent*, Sheridan, Wyoming.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

RESPONDENT'S REPLY BRIEF.

QUESTIONS PRESENTED.

(1) Whether Part 43, FCR 193.3, (R. 70) is binding regulatory law of the same full force and effect of the statute under which it was duly promulgated, or whether it is a complete nullity.

2. Whether the petitioner, who admittedly is authorized to lease the public lands only under the terms of the mineral

* Substituted on his own motion for the former petitioner, Julius A. Krug.

leasing statute and general regulations issued thereunder, can exceed such authority and disregard and violate such law.

3. Whether the official fact of authorized promulgation and required publication of a general regulation has any effect in law.

4. Whether a long-standing and completely uniform construction given to said regulation by petitioner may be ignored at his personal whim.

5. Whether the respondent, having the status of a member of a highly regulated class, federal coal lessee, restricted specially against anarchic over-competition has standing to challenge petitioner's violation of one of the governing regulations designed to prevent this anarchy, and where violation would irreparably damage and impair respondent's entire business.

6. Whether the regulation as relevant law was incorporated into respondent's own federal lease; either by operation of law; or by operation of the specific term of the lease which incorporated the Mineral Leasing Act, of which the regulation had become a part.

7. Whether petitioner can, without repeal, arbitrarily ignore the requirements of a historic general leasing regulation uniformly construed as designed to conserve the public lands for all the people and protect the public interest and the public lands coal industry from chaotic over-competition, for the avowed purpose of granting special privilege and exemption from the law in this one instance only.

8. Whether the United States is a necessary party where only the petitioner has been sued personally to prevent him from exceeding his lawful authority and violating his statutory duty under the very statute conferring his sole authority; where the respondent has claimed no title or

interest in property of the United States; where the United States claims no title or interest in the leasehold property conveyed to respondent; where the United States would be required to do nothing whatever by the relief requested; where the lands of the United States would remain freely disposable in accordance with its laws, after the relief had been granted.

9. Whether petitioner, without requesting relief of the appellate federal court may challenge here its action to protect its mandate to a trial court by ordering a continuance of the trial court's temporary restraint; which restraint, by its own terms, is of only interim duration, for the sole purpose of disposing of the same matter covered by the mandate; especially where the trial court has ignored and refused to recognize a prior substantive ruling of the appellate court, requiring the mandate.

STATEMENT OF THE CASE.

A. THE FACTS.

1. The Situation of Sheridan-Wyoming Coal Company.

Respondent, Sheridan-Wyoming Coal Company, a long-time operator of Federal Coal leases, at this moment stands at the brink of economic disaster and eventual bankruptcy. (Amended Complaint, Sixteenth, R. 56).

Respondent, Sheridan-Wyoming Coal Company, leases certain Federal coal lands in and around Monarch and Sheridan, Wyoming.[1] It operates the Monarch mine upon such land which was leased in 1943. Previously it held Federal coal leases and operated coal mines in this same area long before 1934. Sheridan has modern installed capacity sufficient to supply market demands for this coal, in the area it can serve, twice over.

Some sixteen years ago the government of the United States instituted a general policy of preventing the crea-

[1] Text of lease appears in Amended Complaint, Exhibit J, R. 77.

tion of unneeded over-competition in the chronically sick coal industry of the public lands states.[1] It therefore duly published Regulation 193.3, (Amended Complaint, First (b) R. 51), a statutory Regulation authorized by the Mineral Leasing Act, the purpose and effect of which was to prevent, by sound economic planning, the creation of unneeded new coal mines on Federal coal lands. Thus, in times of prosperity the people would not be led into the creation of new enterprises in a normally sick and overcrowded industry.

For fourteen years the uniform departmental construction required a finding of market need. For the first time, petitioner threatens here to make an isolated arbitrary and discriminatory "exception" and lease Federal coal land to the Big Horn Coal Company *without any market need or any finding of market need as required by this law.*

The petitioner has long and profitably leased Federal coal lands to respondent. (Amended Complaint First (d) and (e), R. 51, 52). Respondent has expended millions of dollars in reliance on the restrictive Regulation as an inducement (Amended Complaint, First (e) and (f)) and bargained for the restriction (*Id.* (g)). (R. 52). Yet petitioner now proposed to create new Federal competition for respondent by granting certain leases to a newly established and adjoining "war-baby" state mine, the Big Horn Coal Company. This he is determined to do in the teeth of the Regulation requiring a showing and finding of consumer need, although he found none;[2] this he would do while expressly reaffirming the regulation and its wisdom;[3] and despite the withdrawal of the lands.[4]

The export coal industry until recently enjoyed a post-war boom. But the Monarch area coal industry, due to its low-grade, non-exportable, substandard, non-storable coal,

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[1] See withdrawal letters of Secretary Ickes, R. 57, 58.

[2] Amended Complaint, Tenth through Twelfth, R. 54, 55.

[3] R. 62, 69.

[4] Amended Complaint, Fourteenth. R. 55.

at the war's end immediately suffered a return to its long term drastic consumption downtrend which had been relieved in forty years only by the two war booms. (See Graph, Exhibit K, Amended Complaint). (R. 84). It finds a limited market under the protection of freight rates for more distant superior coals, but constantly shrinking under the impact of oil.

Respondent has paid royalties on over 1,300,000 tons of coal to petitioner. (Amended Complaint, First (e), R. 50).

2. Big Horn's Activities.

In late 1943, the Big Horn Coal Company, a subsidiary of the gigantic road building contract Peter Kiewit & Sons[5] of Denver, Colorado, somehow prevailed upon the State of Wyoming, with whom Kiewit had many road building contracts, to allow them to establish a new mine in this immediate area, by leasing State lands despite the disastrous history of coal mining in the area. (R. 15). Some few months later, in early 1944, the Big Horn Coal Company started producing this substandard type of Sheridan area coal in direct competition with appellant. The disastrous effect of this large and growing over-competition, in a declining market for this coal, is apparent from the Graph, Exhibit K.[6] It has reduced Sheridan's production to less than half its 1,200,000-ton annual capacity, and threatens serious price wars, loss operations and eventual bankruptcy for both companies.

When the Big Horn Coal Company established its new mine on State lands it had *already* applied for a Federal lease. Big Horn swore this Federal lease was economically necessary to justify the investment required for the estab-

[5] Its size may best be judged from the fact that it has had backlogs of contracts running in the neighborhood of 70 to 80 million dollars. (Affidavit of D. H. Pape, R. 46.)

[6] The figures represented graphically here were taken from official sources of the U. S. Department of the Interior; Graph K should appear at R. 84, and is incorporated in both the Original and Amended Complaints.

lishment of its new state mine. (Amended Complaint, Fifth (c), R. 51). The Big Horn Company was, of course, on notice of the long-published and established rule of Regulation 193.3 in force since 1934, in reliance upon which respondent has been induced to do business with petitioner. (Amended Complaint, First, R. 51, 52).

Ordinarily it would be difficult to see how they could risk the immediate large investment necessary to opening a mine in the teeth of the law and the regulation. But, even at that early stage, their confidence was such that they went ahead and made their investment, notwithstanding the faint prospect of getting the Federal leases, in the face of a uniform rule to the contrary. At that point they were able to predict with perfect safety and uncanny accuracy that somehow petitioner would several years later want to grant their leases *despite* the regulation. Respondent cannot understand Big Horn's extraordinary confidence in foretelling that they would succeed in having this universal law violated or excepted as by petition for them alone, when all others before them has failed.

The type of argument which Big Horn employed most persuasively before the petitioner can best be gathered from the official transcript of the departmental hearing before him. Respondent at trial will prove from the official transcript that Big Horn's chief counsel admitted that the "technical *legal* situation" forbade issuance. He said:

> "So the policy of the law, as reflected by the Act of Congress is that where there is an existing coal mining operation on leases and the deposit of coal will be exhausted within three years, the Secretary of the Interior may, and I say it is the policy of the Act to, give that lessee additional land so that he may continue his operations and not be put out of business. Now, it will be argued that that presupposes a *Federal* lease and that that is not strictly applicable. I *grant* that from a technical *legal* situation, but here is an existing operation on a coal lease leased from the State." (Italics supplied).

Although it is almost unbelievable that an eminent member of the profession should advance such patently erroneous argument with any degree of confidence, in the very teeth of the language and uniform history of Regulation 193.3, he not only did, but was most persuasive with it; as is indisputably shown by the three departmental decisions (R. 59, 62, 66).

Their application, in the teeth of the valued regulation, aroused an industry-wide storm of protest. Respondent protested before the Department even before[7] its publication; other protestants were the Southern Wyoming Coal Operators Association, the United Mine Workers, the Montana Coal Operators' Association, Coal Producers' Association of Washington, Utah Coal Operators' Association, Colorado and New Mexico Coal Operators' Association, etc. (R. 61).

By odd coincidence the effect of Big Horn's slow and dilatory departmental tactics[7] while hastily proceeding with opening and pushing their State mine, was to create the spurious appearance of "going concern values", hardship and equities when the Federal lease was finally considered. Thus, the small state lease was to be used as a springboard to the vast Federal reserves. They would thus "hoist themselves by their bootstraps" as the Court of Appeals said. And they succeeded before the petitioner.

3. Proceedings in the Department.

None of the three administrative decisions in the instant case make a finding of market need as the law requires[8]

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[7] Big Horn had delayed publications of this application from 1943 to 1945 by requesting a special 8¢ royalty rate (2¢ below the usual Federal rate).

[8] Amended Complaint, Tenth (c), Eleventh and Twelfth, R. 54, 55.

nor do they even make a finding of an "old"[9] mine which the then Undersecretary erroneously urged might remove the need requirement. (Amended Complaint, Tenth through Twelfth, R. 54, 55).

The italicized portions[10] of the first administrative decision (dated April 10, 1947) are an excellent example of the arbitrary and capricious tenor of the departmental decisions herein.

Typical is the statement: "This office will not countenance any deliberate attempts to circumvent the . . . regulation" (R. 59) when it then proceeds to do that very thing. The argument runs that respondent had the burden of proving "bad faith" in this respect on the part of Big Horn. None of the prior decisions construing the Regulation suggest so illogical and unfair a rule.[11] Big Horn applied for a Federal lease before starting their state mine. (Amended Complaint, R. 53). They obviously and frankly wanted the prohibitory regulation either ignored or overruled, as the Court of Appeals emphasized.[12] They knew they could not meet the regulation's sole criterion—consumer need—in view of respondent's uniformly below-capacity operations. First, they swore their state reserves were inadequate to justify their planned investment before making it;[13] then they rushed ahead with development which they rely upon as creating "going concern" equities. *Thus, they adopted a course of action effective only to circumvent the Regulation, whatever their mental state.*

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[9] The first decision made gestures in that direction of a vague and implicatory character; later decisions definitely found "new mine". Actually *all* previous applications were screened against the need criterion (Amended Complaint, Paragraph First (c) and (g), R. 49).

[10] R. 59-61.

[11] See the *Olson* and *Cox* decisions, Amended Comp. R. 5161, incl., which are representative of the established construction (Am. Comp. First (c) R. 49).

[12] R. 103; insert 2 as footnote.

[13] Amended Compl. Fifth (R. 53).

The next paragraph of the department's first opinion (R. 60) urges that "Reg. 193.3 does not apply to cases where Federal lessees seek additional land", citing 43 C. R. F. 193.15. The fallacy of this is patent and two fold. First, that regulation rests upon express authorization by Congress, in 30 U. S. C. § 203, for granting additional land to *Federal* lessees upon exhaustion of reserves. Second, Regulation 193.15 itself states that its modifications of Federal leases are "to be made under similar procedure and *on the same conditions* as original leases." (Italics supplied). Thus the statement quoted is disproved by its own citation. Even existing federal lessees are required to prove consumer need on a renewal application.[14] In any event, any rights conferred by § 203 cannot go beyond Congressional intent, which was limited to Federal lessees.

Thus, petitioner's effort begins to evade and disregard the universal criterion of Regulation 193.3—need—by suggesting a novel exception for all "going mines", or "existing mines". But in practice, in every single case since 1934 the challenge has been to prove consumer need for the lease.[15] Only this can serve the basic purpose of the Regulation-preventing recurrence of anarchic over-production.[16] In this case, for the first time, the suggestion is made that the larger and more devastating the new competition on a non-Federal foothold—"existing large mine"—the better the reason for abandoning protection of established Federal lessees. In other words, the larger the violation of Regulation 193.3, the better the justification.

This decision then, oddly, urges two excellent reasons for denying Big Horn a lease (because they show there is no

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[14] Naturally, Federal lessees have something analogous to "grandfather" rights; they have made an investment after meeting the criterion.

[15] Amended Complaint, Paragraph First (c) R. 51.

[16] See *Cox* and *Olson* cases, R. 71-77, admitted by petitioner to be typical.

market need)—(a) there is lots of other competition from distant coals; (b) the coal is poor.[17]

> "The usual criteria to determine the need for a new mine under Regulation 193.3 do not apply." (R. 66).

because Big Horn was a "going concern". (No such exception can be found in the Regulation, its history, policy or application.) Another pretext for refusal to apply 193.3 follows:

> "(the) evidence fails to disclose that its operation (Big Horn's) has jeopardized the continuance of the competing Sheridan-Wyoming mine"[18]

Again, this quotation admits no market need, by pointed failure to make the finding of consumer need for a Federal lease for the Big Horn Coal Company, while discussing the economics of the Monarch coal area.

The second decision by then Undersecretary Chapman (dated July 29, 1947) (R. 62-66) while affirming the first decision, clarified the supposed "old mine" issue in the following language:

> "*In essence, a new mine was created.*" (Italics supplied; R. 64).

This decision concluded:

> ". . . to grant a lease to Big Horn leaves open the *possibility* of continued existence of both the applicant and its present competitors". (Italics supplied; R. 66).

Thus, although there was an admission Big Horn was a new mine, the requisite finding of need was again skirted

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[17] "(2) and (3)" R. 60.

[18] The uncontroverted evidence does show Big Horn has reached a production equal to Sheridan-Wyoming 1943 sales and taken a lion's share of the present market for this substandard coal, leaving Sheridan operating at less than half proven capacity. (Graph, Exhibit K, R. 84.)

and omitted, and a finding of *possibility* of continued existence was substituted. This palpable error of law appears as a part of a continued search for plausible pretexts to reach a predetermined result.

The third decision (dated October 22, 1947) (R. 66-70) expressly refuses to decide the question of future consumer need which is inevitably the basis of the "showing of need" requirement

> ". . . the prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence." (R. 68).

Yet obviously, some prognosis must be the basis of any finding of consumer need.

Next comes the remarkable fallacy that a company buying new mining equipment of the latest type makes no investment unless it borrows money. If it uses its own cash or its current profits, says the petitioner, no investment is made. Thus, the decision says Sheridan can have made little investment since it last borrowed money (prior to 1934) (R. 68, 69) in the teeth of a sworn and detailed showing of an intensive modernization and capital improvement program.

Accent on the substantial size of Big Horn is the closing keynote of this decision. Thus, the very thing which makes Big Horn's violation of the Regulation the more menacing is used as the pretext for exemption. So, notwithstanding this parcel of fallacies, pretexts, and non-sequiturs, Big Horn is granted exemption from the law of the land essentially because it is a large and powerful concern and thus the more serious is the evil of forbidden over-production.

At R. 69, the limits of the novel and arbitrary "exception" are left totally vague.

> "What the decision would be *were* a case presented where a new mine opened on non-Federal lands with

> inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding."

But this is exactly the case presented. The new Big Horn Coal Company filed a Federal lease application *before* they started their new state mine. This they did because of inadequate reserves for their planned scale of operation (which had to be and was asserted under oath in the application). Then, the very question to be determined is whether or not "existence for any period of years" (what period?) or "establishing a position of importance" (i.e., menacing size) can be substituted for the finding of market need required by the law of Regulation 193.3.

These ever-shifting attempts to side-step the plain language of the Regulation and its long-standing interpretation are indicative of the character of the entire proceeding. Even the last novel and contradictory construction or "exception" illegally attempted is stated in terms of the utmost vagueness and inconsistency, with the obvious purpose of making Big Horn its sole beneficiary.

The Court of Appeals' summary of the situation is worth repeating here:

> "Preliminary to the affirmative considerations which lead to a conclusion, we note that *the ground upon which the Secretary proposed to issue the Big Horn lease in spite of his regulation*, is *singularly unimpressive*. The reason he assigns is that Big Horn has a large, established business and so, *although the lease would not have been granted as of the date of the application*, it must now be granted. The fact is that Big Horn made its application even before it was incorporated, and *all its big business has been built up with full knowledge that it had no federal lease. It has now, according to the Secretary's view, hoisted itself by its own bootstraps.*

"*The Secretary does not claim that the regulation is invalid, and he does not propose to withdraw it or modify it. He does not claim that its sole recited condition for a new lease has been met. He does not deny the construction which he has hitherto given it. He proposes to write an exception into it.* He says that it was not intended to apply to the granting of a new lease to an existing company with a large business which alleges that it needs this coal to perpetuate that business. *No such exception can be gleaned from the terms of the regulation or from fourteen years of administrative construction.*

"*Sheridan Wyoming, on the other hand, also has an investment and a good business, which it has established in reliance upon and not in the teeth of the Departmental regulation.* The proposed exception would strip from that lease *one of its most valuable conditions*, a condition established by the Secretary *for the declared purpose of protecting then-existing lessees against ruin.*

"The 'good faith' of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed venture. *It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.*" (R. 103; emphasis supplied).

B. NATURE OF THE SUIT.

The suit is brought by a long-standing Federal coal lessee to prevent petitioner or his agents from issuing, contrary to their statutory duties, certain Federal coal leases which would thereby create illegal and anarchic over-competition against appellant. Additional coal mines on Federal land constitute illegal over-competition unless a consumer need for their production exists (Reg. 193.3). Respondent is a member of the regulated and limited class—Federal coal lessees—given a legal right of protection

against such unneeded and anarchic over-competition by necessary implication of the Regulation. The Regulation binds appellee in this respect both as part of appellants' lease and as a statutory Regulation. Sheridan imminently is threatened with immense and irreparable harm of uncertain amount by the illegal issuance of the lease.

The original complaint alleged (R. 11 through 23):

(1) That Big Horn is a new coal mine, founded on state land in 1943 and that Big Horn simultaneously applied for the Federal leases (Complaint, Par. 5, R. 19);

(2) That appellant, promptly on learning of the application, filed protest (Complaint, Par. 6, R. 20);

(3) That the protest was fully litigated before the Department on the ground of violation of Regulation 193.3 (Complaint, Par. 7, 8, 10, 11 and 12, R. 20, 21);

(4) That the issuance of the lease is illegal because the necessary finding of fact under the Regulation has not been made (Complaint, Par. 12 and 13, R. 21, 22);

(5) That the Regulation has the force of statute (Par. 15, R. 22);

(6) That the lease is illegal on the independent ground that the land has been effectively withdrawn from the public domain (Complaint, Par. 14, R. 22);

(7) That plaintiff-appellant is a member of the special class established by the Regulation (Complaint, Par. 15) and that the imminent issuance of the lease will result in damage of large but unascertainable amount to plaintiff by creating further and more effective, but illegal, competition from Big Horn (Complaint, Par. 16) in the limited market for Monarch area coal (Graph, Exhibit F, appearing in Record here at R. 84, denominated Exhibit K Amended Complaint).

The Complaint prayed for temporary restraint, temporary injunction and permanent injunction against such illegal issuance.

This Court of Appeals affirmed the original ruling of Justice Holtzoff that the original complaint failed to state a cause of action because of want of standing to sue, noting however that the original complaint did not establish respondent's status as a Federal coal lessee nor set out the terms of its lease (R. 31-34); and indicating that, if pleaded, standing would exist (see R. 97, 98).

Respondent then promptly sought to amend the original complaint by adding the following allegations:

1. That appellant presently holds and has fully complied with a Federal coal lease issued in 1943, a successor to older leases. (Amended Complaint, Par. 1(d), R. 51).

2. The full text of appellant's lease. (Amended Complaint, Exhibit J, R. 77-84).

3. That, ever since 1934 the uniform departmental rule has required and resulted in the denial of any lease application unless the finding of consumer need, requisite under the Regulations, could be made. (Amended Complaint, Par. 1(c), R. 51).

4. That *in reliance on that rule*, and in accordance with the requirement of its lease, plaintiff has invested huge sums in mining equipment and the cutting of new entries (Amended Complaint, Par. 1(e) and (f) and (g), R. 52).

Relief identical with that requested in the original complaint was sought.

C. PROCEEDINGS BELOW.

1. Before Justice Holtzoff.

Originally, in November of 1947, petitioner filed a motion to dismiss respondent's complaint, supporting that motion with the following four points:

(1) The United States was a necessary party

(2) The Big Horn Coal Company was a necessary party

(3) The respondent had no standing to sue

(4) The petitioner was not bound by his own statutory regulation, but might exercise an over-riding absolute discretion.

Justice Holtzoff correctly ruled on the first two points; the United States was not a necessary party since petitioner was, under the theory of the complaint, issuing a lease in direct violation of his statutory authority and duties, created by the Leasing Act and Leasing Regulations; and Big Horn was not a necessary party, since until a lease was issued Big Horn could never acquire a legal right to it.

Further, Justice Holtzoff ruled in petitioner's favor on the latter two points. This he did despite oral argument (R. 26) based on the affidavit of the federal lease. Justice Holtzoff accepted the lease as a fact, as is indicated by his oral opinion.[19]

In retrospect, it is unfortunate respondent did not move to amend its complaint at that point to include its own lease.[20] Such amendment, however, appeared totally vain

[19] The plaintiff has a lease on other mineral lands . . . His lease contains no provision that no other leases should be granted . . ." (R. 17. See Affidavit of Current Facts (2), R. 26.)

[20] It should be noted, however, that the motion to dismiss was filed out of time, on the very eve of the hearing. See Argument, R. 5, 6. Thus, respondent's counsel had to act under the greatest pressure.

and unnecessary in view of Justice Holtzoff's previous consideration of the lease during argument and his sweeping adverse views of the substantive law, notwithstanding anything the lease might contain (Pars. 3 and 4, Opinion, R. 17).

Justice Holtzoff concluded by dismissing the complaint and denying preliminary injunction.

2. The First Appeal.

The Court of Appeals affirmed the action of Justice Holtzoff, indicating that respondent had not sufficiently pleaded its real claim:

> "*Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands;* that the regulation above mentioned, having the force of a statute, was part of its lease; and that this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the Chicago Junction Case and kindred cases and under the general considerations which controlled the Court in deciding Federal Communications Comm'n v. National Broadcasting Co. (KOA) and similar cases. Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses. *Under the decisions, those persons were entitled to sue. The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease.*" (R. 31, 32) (Footnotes omitted; italics supplied).

Respondent moved the Court of Appeals for permission to supply below those indicated deficiencies of pleading. Petitioner opposed, and an informal hearing was held. That Court then amended its judgment by granting leave to the District Court permit such amendment.

3. Before Justice Letts on Remand.

The day after that Court's mandate was received in the District Court, respondent filed an amended complaint as of course under Federal Rules of Procedure, Rule 15, and also filed a motion for leave to file said amended complaint. The amendments supplied the deficiencies of pleading indicated by the Court's opinion. Petitioner did not present an order on the mandate of affirmance to Justice Holtzoff until after this motion had been filed.

Petitioner did not formally move to strike the already filed amended complaint, but did oppose the motion for leave to file it. Justice Letts heard and overruled the motion and filed a memorandum opinion (R. 86).

The stated reason for overruling respondent's motion was "*the proposed new matter adds nothing material to the claim and issue presented by plaintiff in the original complaint.*" In the light of the Court of Appeals' opinion, this was a ruling, in the teeth of that opinion, that the amended complaint did not state a cause of action. Justice Letts' action was therefore tantamount to dismissal of the amended complaint with prejudice on a ground already indicated by the Court of Appeals to be error.

Accordingly, respondent promptly filed a general appeal from this order and simultaneously applied to the Court of Appeals for the continuance of temporary restraint. That Court granted the temporary injunction pending appeal and ordered the cause down for hearing.

4. The Second Appeal.

The Court of Appeals had held numerous and exhaustive hearings, formal and informal, comprising many, many hours in total. Accordingly, the Court of Appeals issued a lengthy and detailed opinion on January 31, 1949, reversing the denial of amendment in the teeth of the substantive law expressed in their prior opinion in order to protect their appellate jurisdiction. (See *infra* VI, p. 85).

To shorten further proceedings, that Court also expressed its views forcibly on all the issues in this controversy, particularly noting that

> "the ground upon which the Secretary proposed to issue the Big Horn lease is *singularly unimpressive.*" (R. 103) (Italics supplied).

and that

> "The proposed exception would strip from that lease one of its most valuable conditions, *a condition established by the Secretary for the declared purpose of protecting then existing lessees against ruin.*
>
> "The 'good faith' of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed ventifre. *It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.*" (Italics supplied).

The quoted comments on Big Horn's good faith should be read in the light of the astonishing purport of the Big Horn brief *amicus curiae*, and the silent admissions contained therein; Big Horn violently objected to respondent's opening brief, collected certain isolated factual statements from it, placed them in juxtaposition and urged that they constituted a charge of impropriety as follows: that Big Horn's "singular" persuasiveness[21a] with Wyoming officials and officials of the Department of the Interior was due to the following factual picture: the enormous size and resultant widespread interests of their corporate parent,

[21a] That their persuasiveness was unique may be seen by the storm of industry-wide protest the departmental action aroused from the Western coal associations and the United Mine Workers (see *supra*, p. 7). Big Horn did not attempt reply to respondent at oral argument or by answering respondent's reply to the brief amicus curiae. Respondent will file certified copies of both these briefs with the clerk of this court, for the court's convenience.

Peter Kiewit Construction Company, a huge road-building and general contractor with headquarters in Denver, Colorado, where, for some reason, the oral hearing in this Wyoming controversy was held.

Respondent replied specially, noting that it had nowhere made the charge or assembled these facts. Respondent further remarked that it was singular Big Horn neither could nor did deny any element of the factual picture which they had assembled and which, they themselves claimed, provided an inference of improper influence by them.

SUMMARY OF THE ARGUMENT.

A. The time-honored and historic coal-land regulation here in question (43 C. F. R. 1933) requires that federal coal leases additional after its date (1934) shall be approved only where there is a consumer need for the production sought which can not otherwise reasonably be supplied. The regulation was originally adopted in 1934 for the purpose of mitigating and preventing the recurrence of then existing anarchic over-production from the unbelievably limitless low-grade coal reserves on the western public lands. Secretary Ickes, in his withdrawal letters (R. 57), cited eloquent descriptions by this Court in *Sunshine Anthracite Coal* v. *Adkins*, 310 U. S. 381, and in Justice Cordozo's brilliant dissent in *Carter* v. *Carter Coal Company*, 298 U. S. 238, of the terrible and bloody anarchy of over-production existing in the coal industry generally at that time, in supporting his action; the use of his law-making (*supra*) and withdrawal (*United States ex rel McLennon* v. *Wilbur*, 283 U. S. 414) powers under the Mineral Leasing Act and related legislation, to prevent this anarchy on the public lands and to protect existing federal lessees like respondent, in so far as it lay within his power, from this anarchy. This position of Ickes, and its citations, have been repeated and paid homage by the Department as recently as 1946, in the *Cox* and *Olson* cases. (R. 71-76) The

amended complaint alleges (Amended Complaint, First, R. 51) and the petitioner was unable to produce any contrary precedent on a most unusual and insistent inquiry by the Court of Appeals, that a uniform construction and practice has been consistently followed in the Department, of investigating and making a finding of market need in each and every successful application from 1934 to the present controversy; and of properly and consistently treating the regulation as a wise and binding rule of law "precluding" the grant of a lease unless the finding can be made or unless the regulation is formally repealed. In all of these decisions and in all of this practice, including the present controversy when it was before the Department, the Department has eloquently reaffirmed the timeless wisdom of the policy embodied in the law expressly refusing to repeal it; but has, in this case, by astonishing and arbitrary administrative interpretation in the teeth of this uniform prior practice and precedent, determined to make a single not-to-be-repeated "exception" on what the Court of Appeals has correctly characterized (R. 104) as the "singularly unimpressive" ground of self-imposed "hardship" to the war baby Big Horn Coal Company. This situation petitioner conjures from the application to Big Horn of the law, just as it was uniformly construed and widely published at the time in 1943 when Big Horn began its operation on a state "school district" isolated in the federal reserves, simultaneously swearing that it must have federal coal and "not glossing over the fact it wanted the regulation either changed or ignored." (R. 104). Petitioner makes no serious effort to controvert this showing of violation of the uniform prior law. He instead devotes his major effort to twist the real facts and history to come within inapplicable technical doctrines, "sovereign immunity", "want of standing to sue", designed to prevent respondent from stopping the virtually confessed violation of this wise and historic restrictive law designed for its protection and the protection of the western public lands coal industry;

and from thus preventing the ruin of respondent's own property and business by arbitrary abuse of power in the teeth of the protection of the regulation respondent bargained for and obtained (Amended Complaint, First (g), R. 52); and relied upon in investing huge sums in modernization and expansion (Amended Complaint, First (e), R. 51)

B. The Mineral Leasing Act, 30 U. S. C. 181 *et seq*, delegates *legislative* power to the Secretary of the Interior to make regulations, having the force and effect of statute, and so to create a healthy and sane coal industry on the public lands, 30 U. S. C. 189, and requires him to govern issuance of federal coal leases by *general* regulation, 30 U. S. C. § 201. He is required by the Administrative Procedure Act and related legislation to publish in the Federal Code of Regulations such of these as are of "general applicability and legal effect" and not mere "internal management directives". He so promulgated this regulation in the Federal Code of Regulations. Repeated subsequent reenactment of the parent Mineral Leasing Act by Congress after the regulation was formally promulgated amounts to adoption of the regulation by Congress. *R. J. Reynolds Tobacco Co.* v. *Helvering*s, 306 U. S. 110. (1939).

As the Court of Appeals held, it is thoroughly settled law that such regulations, issued under a Congressional delegation of legislative power, have the force and effect of statutes (*Hodgson* v. *Midwest Oil Co.*, 297 U. S. 293) and bind the department issuing them until formally altered or repealed. *Consumers Power, et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. 2d 533; *Sibray* v. *United States*, 282 F. 2d 95, and the principle has particular application to the regulations and practice of the Land Department, involving as they do the desirable security of land titles. *Germania Iron Company* v. *James*, 89 Fed. 811. This leading case, almost upon all fours with the present one, is pointedly ignored by petitioner. He similarly fails to cite

the leading Land Department language interpretation cases of this Court (*Work* v. *Mosier*, 261 U. S. 352, 360 and *Work* v. *McAlester*, 262 U. S. 260), which exemplify the sound principles that the Secretary of the Interior can neither avoid his ministerial duties under plain statutory language of the land laws nor evade and ignore his own uniform prior construction of language possibly otherwise dubious. Petitioner relies instead upon the totally inapplicable rule of strict construction of dubious language, claimed to grant perpetual or otherwise unreasonable private monopolies, such as *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, and ignores the different rules applicable to uniformly construed reasonable regulations and contracts restricting against anarchic and harmful over-competition (*Walla Walla Water Company* v. *Walla Walla*, 172 U. S. 1, and *Superior Water Company* v. *Superior*, 263 U. S. 125), not to mention the fact that *Frost* v. *Corporation Commission*, 278 U. S. 515 completely rebuts the application of the doctrine of *Charles River Bridge*, a historic standard regulatory criterion such as market need.

C. Respondent has a right to prevent the virtually confessed violation of this law, to its irreparable ruin, on two separate and independent grounds of special relationship to the law in question, one of property right arising from its lease, *Frost* v. *Corporation Commission*, 278 U. S. 515, the other of regulatory status. The regulation is a term of appellant's lease on the following grounds: through express inclusion of the Mineral Leasing Act in paragraph 1 of the lease (R. 78), with resultant necessary inclusion of the regulations which have become a part thereof, *supra* B; through express reference to the regulations in paragraph 6d (R. 83); by estoppel, since the respondent has made heavy investment in justified reliance on the regulation and its uniform interpretation (R. 52); by operation of law, since every contract incorporates relevant law regardless of express inclusion (*Wood* v. *Lovett*, 313 U. S.

362); nor have the *Tennessee Power Company* v. *TVA*, 306 U. S. 118, and *Alabama Power* v. *Ickes*, 302 U. S. 474, cases, so heavily relied upon by petitioner to rebut this showing, any relation whatever to the wholly different factual and legal background of the present case. Here the regulatory law is expressly designed to prevent anarchic over-competition for the protection of the western public lands coal industry, including respondent. Wasteful over-competition is thus itself prohibited by law, and we have not, as in those cases, a situation in which a competition, unprohibited and unrestricted by regulatory law, is claimed rendered "illegal" by some remote illegality in the particular competitor's organization or financing.

Respondent has a second independent ground of legal standing to challenge issuance of the Big Horn lease, by virtue of its status of legitimate membership in a specia. class, the public lands coal industry, deliberately and formally regulated against anarchic over-competition. This status right rests, as the Court of Appeals said, on the considerations underlying the judgment of this Court in the *Chicago Junction* case (*Baltimore and Ohio Railroad* v. *United States*, 264 U. S. 258), and the radio cases, notably *Federal Communication Commission* v. *National Broadcasting Company* (*KOA*), 319 U. S. 239. In those cases a threat of an arbitrary administrative departure from a settled statutory criterion designed to prevent anarchic over-competition or unfair competition was preventable because they violated special rights of the plaintiff necessarily implied in that regulation of destructive competition itself, for the benefit and protection of legitimate competitors. In response to proof of respondent's plain regulatory special interest and of its property right in the regulation, petitioner first chiefly devotes himself to an effort to prove the absurd premise that Secretary Ickes and his successors intended no regulation of the western public lands coal industry against wasteful and anarchic over-competition. (See *supra*, 20). Petitioner's second effort to pre-

vent enforcement of the regulation seeks to confuse the real issue, that respondent has a *special right* against anarchic over-competition on the public lands, with the obvious fact that Congress had no need to and did not provide a *special forum* for review of decisions of the Bureau of Land Management, in order to prevent outlandish, novel and arbitrary administrative discrimination against regulated status and destruction of plain property rights such as is present here. Congress of course is aware that the Courts have been adequately able to correct such efforts in public lands cases under their normal equity powers in a time-honored line of cases, a bare handful of which are *Lane* v. *Hogland*, 244 U. S. 175, *Work* v. *Mosier* and *Work* v. *McAlester*, *supra*, and *Santa Fe Pacific Railroad* v. *Fall*, 259 U. S. 197. Congress cannot be assumed by its mere silence to has disapproved normal equity protection by a constitutional court of property rights against disregard of statutory ministerial duty in the time-honored manner of the land cases, Cf. *Scripps-Howard Radio* v. *Federal Communication Commission*, 316 U. S. 4, 11, but instead expects it.

D. While, of course, the equal protection clause of the Fifth Amendment is not specifically a part of the Fifth Amendment, rank administrative discrimination without a reasonable basis of classification is violative of the basic requirements of justice and fair play of the due process clause of the Fifth Amendment. *Hamilton National Bank* v. *District of Columbia*, 156 F. 2d 843 (1946). As we have shown *supra*, the novel construction claimed for the first time in the District Court, contrary to the settled precedent and practice of the Department for fourteen years, is such a rank discrimination. The respondent, like every other applicant, has been required since 1934 to meet the criterion of Regulation 193.3 and to do so every time that respondent applied for a renewed federal lease, (Complt. R. 51) whereas a single exception is to be made for the Big Horn Coal Company on account of the size of the over-competi-

tion that it creates. Such retroactive "repeal", without any of the formal steps required by the Administrative Procedure Act, is prohibited by the doctrine of *R. J. Reynolds Tobacco Company* v. *Helvering*, 306 U. S. 110 (1939), and *Helvering* v. *Griffiths*, 318 U. S. 371 (1943). Even if it be assumed, contrary to the obvious fact, that the petitioner in the case at bar has endeavored to exercise his legislative power, the Mineral Leasing Act has been repeatedly amended since Regulation 193.3 was promulgated in 1934, the last time in 1944. 58 Stat. 275. The *Germania Iron* case, *supra*, and its indignant language at a similar arbitrary effort by another Secretary to upset settled practice on which land titles depend is equally applicable here.

E. The United States is not a necessary party to this suit which seeks only negative relief against the petitioner personally to prevent him from exceeding his authority in violation of the very laws of the United States under which he claims his sole authority.

It was not necessary for the Court of Appeals to reverse the District Court on this point. At the outset the District Court had held it an elementary proposition that the presence of the United States was not required here where a government officer was sued personally to prevent him from exceeding his authority.

A long line of classic authorities demonstrates the District Court's point:

Rolston v. *Missouri Fund Commissioners*, 120 U. S. 390;
Pennoyer v. *McConnaughy*, 140 U. S. 1;
Scully v. *Bird*, 209 U. S. 481;
Atchison, T. & S. F. R. Co. v. *O'Connor*, 223 U. S. 280;
Philadelphia Co. v. *Stimson*, 223 U. S. 605;
Waite v. *Macy*, 246 U. S. 606;
Payne v. *Central Pac. R. Co.*, 255 U. S. 228;
Santa Fe Pac. R. Co. v. *Fall*, 259 U. S. 197;

Work v. Louisiana, 269 U. S. 250;
Larson v. Domestic and Foreign Corporation, 337 U.S. 683.
Hynes v. Grimes Packing Co., 93 L. ed. (adv.) 965

The respondent has not claimed any interest whatever in the unleased lands of the United States, contrary to the erroneous factual impression which petitioner seeks to create, without trial of his assertion. He claims that respondent is "proceeding against property in which the United States has an interest". But respondent's only property claim is an indisputable right to its own regulated business and leasehold interest, which it here seeks to defend against the irreparable impairment which the petitioner's lawless and unauthorized action would accomplish. It is the leasing laws of the U. S., designed to prevent chaotic overcompetition against the respondent and the federal land coal industry, which prevent the issuance of the questioned leases to Big Horn, upon its bold demand for a special privilege of exemption.

Petitioner does not seek to compel specific performance of *anything*, contrary to petitioner's conjured invention. He seeks to create the erroneous factual impression that respondent here is attempting to compel some unspecified positive action from the United States through the device of requesting relief which is negative in form only. He cannot point out just what the fancied positive relief could be, but rather employs the voluminous citations of cases having no application here. The plain truth is that neither the United States nor the petitioner would be required to do one single positive act. The relief requested here would only *prohibit* petitioner from violating the leasing laws of the United States in this one instance, which is required by his statutory duty in any event. The public lands of the United States would remain freely disposable pursuant to its laws as they have always been.

The cases which petitioner cites all contains distinguishing qualification in recognition of the familiar rules that

where no positive performance is sought to be compelle from the sovereign, and the relief sought in actually neg tive against a government officer personally to prevent a exceeding of his authority and violating his duty, th United States is not a necessary party. Likewise the *La son* case, *supra*, which is cited by petitioner clearly re ognizes the distinction by express qualification therefor i its doctrine.

F. In reversing the District Court's refusal to allo amendment of the complaint, it was necessary to the pro tection of its appellate jurisdiction for the Court of Ap peals to indicate in its opinion, protection for the mandat which would, thereafter, issue. The means which it adopte —a continuance of the District Court's own temporary re straint, which was necessarily subject to all the qualifica tions thereof—was proper and could not possibly be mis understood as the equivalent of a statutory preliminar injunction under Rule 65, FRCP, as petitioner charges. I its temporary restraint, the District Court has specificall allowed for a further hearing on preliminary injunction i the event the complaint was amended. (R. 109).

In any event, the issuance of the mandate of the Cour of Appeals was stayed by petitioner, and assuming *argu endo* the non-existent injury which he now anticipates, hi remedy would be in the Court of Appeals where he cou have the matter clarified before issuance of the mandate Petitioner has no right to rely here upon a supposed erro never called by him to the attention of the Appellate Cour in the usual way.

It is clear that the District Court refused to conform t the substantive ruling of the Appellate Court's prior de cision. The District Court, after the first appeal, plainl ruled that amendment of the complaint would "add nothin material," despite the Appellate Court's prior decision tha the result would be different if the allegation of respon dent's lease had been made in the complaint.

The District Court's adamant refusal to follow the distinction drawn by the Appellate Court's first opinion, needlessly required the expenditure of extra time and effort by the parties and the Court of Appeals in necessitating additional consideration of restraint by the appellate court and an additional appeal.

ARGUMENT.

I. REGULATION 193.3 PROHIBITS ISSUANCE OF THE BIG HORN LEASE.

1. The threatened violation is plain; and this controlling issue is avoided by petitioner.

Petitioner has no heading in his latest brief, "The proposed lease to Big Horn does not violate Regulation 193.3", nor any similar one, nor is the substance of this contention anywhere clearly and forthrightly made. This contrasts with his earlier briefs below, and his administrative decisions, which, while they vacillated from one excuse and rationalization to another, denominated "constructions of 193.3", nevertheless sought to meet this fundamental issue. On the contrary, the major efforts in his latest brief are designed uniformly to avoid meeting this basic issue head on, by concentration on preliminary, technical and utterly inapposite arguments such as sovereign immunity, want of standing to sue, strict construction of statutory grants of irrevocable privilege, and even, astonishingly enough, invalidity of the Regulation if construed in accordance with his own fourteen years of uniform prior construction.

Respondent considers that the one fundamental issue in the controversy on which all others turn is exactly the one petitioner has thus avoided. If the Regulation is being violated, every one of petitioner's finespun theories falls of its own weight. For, thereafter, respondent's next point (II) is hornbook law—that the Leasing Regulations are part of the law of the land; and hence petitioner's theory of sov-

ereign immunity becomes a patently erroneous claim of right to violate, disregard, and act in the teeth of his statutory authority and duty, expressed in the Leasing Act and the Regulations which have been issued under it; and then, standing to sue follows easily from the Regulation as petitioner and his predecessors have always construed it: *i.e.*, as a wise and timeless conservation law designed to prevent the chaos and anarchy of coal over-production in the public lands states and to preserve the economic health of the existing Federal lessees by restricting production to market need; this necessarily confers a right on the holder of a Federal lease incorporating the Regulation to protect his property against an administrative officer arbitrarily threatening to exempt a single favorite newcomer from the law, while reaffirming it in his legislative capacity.

2. Regulation 193.3 prohibits issuance by its terms, purpose and uniform interpretation.

Both the original and amended complaints allege that the petitioner has not made and cannot make the requisite finding of fact, *i.e.*, that there is market need for Big Horn's production. These allegations stand undenied. (See, for fuller treatment, "Statement of fact", *supra*.

The terms of Regulation 193.3 prohibit issuing a lease to Big Horn without this finding:

> "Showing Required That an Additional Coal Mine Is Needed.
>
> The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished *a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise* be reasonably met." (Italics supplied). (Reg. 193.3 F. C. R. 43).

Regulation 193.3, promulgated in February 1934[21b] was de-

[21b] Reprinted as Exhibit F, Amended Complaint, R. 70.

signed to prevent the creation of unneeded new coal mines. The coal industry is normally sick. The creation of new unneeded Federal mines would obviously have a disastrous effect upon the investment and revenues of existing Federal coal lessees. The terms of the withdrawal letters (Exhibits A and B, R. 57, 58) which immediately preceded the promulgation of the Regulation further clarify this point and elucidate the high policy of law behind the regulation. A chief purpose of both actions was to prevent the creation of unneeded competition for existing Federal coal lessees. The Sheridan-Wyoming Coal Company, as a then existing Federal coal lessee, is plainly protected by the policy and purpose of the Regulation. Sheridan was and is a part of the protected class—the then existing Federal coal industry.

The Sheridan-Wyoming Coal Company, since the war-inflated local demand is returning to normal, is presently faced with imminent disaster and eventual bankruptcy. The new competition of Big Horn on their State land has already taken half the market for Sheridan area coal. (Exhibit K, R. 84). This, coupled with the rapidly declining quality, threatens the very existence of Sheridan-Wyoming.

In the three recent prior decisions within the Department (which restate the position of the Department in some forty other unreported cases since 1924), the Regulation was reaffirmed and clearly and correctly construed. In *Carl T. Olson*, decided March 25, 1946 (R. 71), and the same case on rehearing December 19, 1946 (R. 75), together with *Lyman Ray Cox*, decided September 3, 1946 (R. 46), the Regulation was properly treated as follows:

> (1) The appellee invoked the "*rule*" of 193.3 as a *rule* having the force and effect of law which "*precluded*" granting a lease to an unneeded mine.
>
> (2) The appellee treated the policy which it controlled as one of the broad public significance affecting

third parties *and especially protecting the existing coal lessees.*

(3) Appellee specially indicated that the Regulation would have to be repealed before its policy was abandoned;

(4) The Regulation was *invoked specially as a part of the Federal Code of Regulations* as it would have to be under the meaning and language of Title 5 U. S. C. A. Sec. 511.

Specific reference to the above conclusions from the *Olson* and *Cox* cases are as follows:

(1) The second Olson decision states (R. 75):

". . . The ground for the *decision* was a *finding* that there is *already sufficient productive capacity in the vicinity to meet the demands of the market* . . . In such cases the *rule* of the Department *precludes* the granting of an additional coal lease (43 Code Federal Regulation 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule the decision concluded that it would be contrary to the public interest to *abandon this rule.*" (Italics but not parentheses supplied.)

(2) The previous *Olson* decision, dated March 25, 1946, contains the following significant conclusion (R. 74):

'On the contrary, the course of wisdom would indicate that it should carefully refrain from accentuating a condition *which may bring depression* upon a great industry . . .

"This consideration, taken in conjunction with the position of the Department as a present and potential royalty owner, indicates that *revision* of the Departmental *rule* at this time *would be harmful to the lignite coal industry and not in the public* interest." (Italics supplied.)

(3) The *Lyman Ray Cox* case, No. A24405, dated September 3, 1946, after a recital of 43 Code Federal Regulations 193.3, stated:

> "This *regulation* was *promulgated* in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that the *repeal* of the regulation would be harmful *both to the bituminous coal industry* and to the public interest.". (R. 77.)

The frequent use of the word "*rule*" is most significant. "Law" may be defined as a Rule of action mandatory in form, properly promulgated and enforced by a competent authority. Throughout these opinions we have references to the Regulation as a "rule"; we have promulgation in the place required by Congress, from whom all the Secretary's authority over public land is derived; we have therefore the Secretary, the authority duly appointed and competent, exercising his delegated rule-making power; we have him enforcing his Regulation as a binding rule; we have a rule which is in terms mandatory (the words "will" . . . "only"). In short, the Regulation fully satisfies the definition of a law.

These decisions unmistakably require the conclusion petitioner is powerless to issue the leases in the absence of need, since they reiterate he is precluded from and powerless to do so *in view* of the Regulation, save for the alternative of *formal repeal or modification* of the Regulation. No reference can be found to any overriding power to make a "hardship" exception.

In terms, the Regulation is directed to the Bureau of Land Management. But the Bureau of Land Management is the sole body which exercises the judicial and administrative functions relating to public lands delegated to the Secretary of the Interior by the Congress. In order to have a government of laws and not of men in this country, it is clear that the Secretary of the Interior cannot first make a mandatory rule for the control of his sole tribunal and for the protection of the rights of third parties, and then assert the right to exercise one-man government, and ignore his own regulation with the force of statute, be-

cause he has not expressly said, "I am personally bound by this Regulation." *Indeed, he did not say that he is not bound in his decision.*

It should be carefully noted that in the various departmental decisions in the case at bar (R. 59-70), the Regulation has *not* been *abandoned* but has again been *reaffirmed*, no doubt for the reasons so eloquently stated in the *Olson* cases.

In all previous cases, treated essential to a favorable decision that market need should be found, and the uniform and routine departmental practice has been to conduct extensive investigations to assess the market need before passing on every application.[22] But there has never been the slightest hint that the mere fact of being a large but new "going concern" was any reason for exemption from the application of the Regulation.

Thus, the arbitrary and capricious discrimination in favor of Big Horn stands revealed for what it is.

3. Petitioner has scarcely tried and totally failed to disprove violation.

As noted in the introduction, petitioner's answer to this showing that the proposed lease violates the Regulation is never forthright and direct. It must be winnowed from among the chaff of more technical and completely inappropriate theories.

Under a heading aimed at respondent's standing to sue[23] petitioner first repeats in novel disguise (p. 20-21) the somewhat disingenuous contention, so convincing rejected by the Court of Appeals, that the Regulation binds only his subordinates, the General Land Office, and not himself; that he has some peculiar overriding "discretion" to make

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[22] Amended Complaint, R. 51.

[23] "A. The regulation does not purport to vest any rights in respondent or other lessees, and it would be contrary to settled principles of construction to give it the effect prescribed by the court below."

arbitrary administrative "exceptions" to the statutory regulation and its settled prior construction. The argument essentially boils down to "Do as I say, not as I do." Petitioner attempts no answer to any of the five cases[24] cited and heavily emphasized by the Court of Appeals to overrule this contention for its essential lawlessness.

The Court of Appeals said:

> "The regulation was published in the Federal Register as one of general applicability and legal effect. It had the force and effect of statute. As such, it was binding upon the Secretary until repealed or modified by him. Judge Sanborn's opinion in *Germania Iron Co.* v. *James* and Commissioner (now Circuit Judge) Frank's opinion in *Consumers Power Company et al.* should be read in full upon this point. Other authorities are cited below."
>
> "The regulation meant what the Secretary held it to mean. When he promulgated it, he said it reached 'substantially the same effect' as a withdrawing of the land from leasing. Thereafter he consistently held that it precluded the grant of leases to these lands unless market need for additional coal was shown." (R. 104.) (Citations omitted, emphasis supplied.)

Petitioner does not even cite *Germania*, the leading case on the subject.

As a member of a specially limited and regulated class (see *infra* III), respondent is lawfully entitled to rely upon the long established practice, custom and usage of appellee and his predecessors in denying leases for unneeded mines. Petitioner cannot commit a violation of the practice, as such, let alone where the practice has become a statutory regulation. Nowhere is the principle of "stare decisis" dearer to the law than in matters affecting land.

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[24] *Germania Iron Co.* v. *James, supra, Consumers Power Co. et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. 2d 533 (C. C. A. 2d 1935); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y. 1923); *Sibray* v. *United States*, 282 Fed. 795 (C. C. A. 3d 1922).

A case so closely analogous to the present one as *Germania Iron Company* v. *James*, 89 Fed. 811 (C. C. A. 8, 1898) would not have been totally ignored by petitioner save that no reply is available to him. In the *Germania* case, it was alleged that the action taken on a motion for the exercise of supervisory authority by a successor Secretary of the Interior was illegal under a long-standing rule and practice of the Department. The rule in question provided that land once withdrawn was not open to entry until the decision of the Secretary of the Interior making it open to entry had been communicated to the local Land Office.

Five years later, after full litigation before the Department, the successor Secretary ruled that the land had been opened to entry immediately the Secretary filed his decision, ignoring the prior rule that the decision had to reach the local Land Office. It was urged, as here, that the Secretary had full discretion notwithstanding a contrary rule binding upon his subordinates.

The Court disposed of that contention in the following language:

> "*System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the land department as in the courts.* Doubtless every applicant for this land, but one, relied upon the settled practice of the department, and presented his application for it at 9 o'clock in the forenoon of February 23, 1889; yet that one who violated the rule and practice, and made application to the officers out of office hours, and before the land was open for entry under the practice of the department, has defeated all the others. He who came in by some other way has defeated every applicant who came "by the door." *What a farce the attempt to secure rights in any judicial tribunal must become, if its rules and practice are ignored or applied at the arbitrary will of the judge who presides over the court!* Under such an administration of the land department, the rights and titles

which the law attempts to protect and secure *would become naught but privileges dependent upon the gracious favor of its officers.*" (*Id.* at 818. Italics supplied.)

So, in the instant case, has the Sheridan-Wyoming Coal Company relied upon the settled practice of the Department and publication thereof in the Federal Code of Regulations.[25] See the *Cox* and *Olson* cases, *supra*, pp. 31, 32. It has expended money in creating a modern mechanized mine; believing it was protected from unneeded competition by the statutory regulation and the long standing practice thereunder.

The more recent cases cited by Court of Appeals reinforce the necessary conclusion from *Germania*.

In *Consumers Power Company* the Commission rejected the contention that it could, under some supra-legal "discretion," refuse to apply an existing regulation without repealing it. Commissioner (later Circuit Judge) Frank held that:

> "Since Rule U-9C-3 (14) is a valid exercise of rule-making power, it has the force and effect of law. * * * The existence of the power to amend old rules and make new ones permits an administrative body to achieve flexibility without disregarding the provisions of a rule which it has adopted and which stands unchanged." (At 33 F. 11-2, Pike and Fisher, Administrative Law Decisions—6 S. E. C. 444 (1939.)

In *Perkins* (79 Fed. (2d) 533, C. C. A. 2d, 1935) the Secretary of Labor and her subordinates had only partially observed a regulation which directed the subordinates to forward to the Secretary the record of their recommendations with respect to an Immigration hearing. The Second Circuit unanimously held that:

> "Since the rules of the Labor Department have the force and effect of law and are binding upon the De-

[25] Amended Complaint, First (e) (f), and (g) R. 52.

partment as well as upon the alien, the failure to follow this rule resulted in an unfair hearing contrary to that to which the alien was entitled in this proceeding." (79 Fed. at 534.)

In *Dunton* (288 Fed. 959) the Assistant Secretary of Labor and his subordinates had chosen to disregard a Departmental rule permitting the presence of one friend of an alien in an Immigration hearing. Augustus Hand, then sitting on the District bench for Southern New York, said:

> "I should undoubtedly dismiss the writ [habeas corpus] were it not for the fact that the Department had *failed to observe its own rule* in respect of hearings. * * * *The hearing was without due process of law.*" (Parenthetical matter and emphasis supplied; 288 Fed. at 960.)

In *Sibray* (282 Fed. 795) the Commissioner of Immigration and his subordinates had ignored an Immigration regulation which had been promulgated under the standard type of statute authorizing general regulations by the Commissioner General of Immigration.

The Third Circuit unanimously held that if officers of the government were to be judicially permitted to ignore their own law:

> "*the administration of this statute will be according to the caprice of men, and not according to the fixed requirement of law.* Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. *Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment, to set aside any one of the rules on which the rights of aliens depend.* * * * Congress, in its wisdom, has enacted a statute, under the provisions of which, in accordance with the rules established by the Commissioner General, certain aliens may be deported, and every alien charged with crime has the right to rely upon the ob-

servance of the statute and those rules by those charged with their enforcement in a proceeding to deport him. *It is not within our province to speculate in any particular case what effect the disregard of those rules might or might not have.*" (282 Fed. at 798; emphasis supplied.)

It may be noted, also, that the immigration cases cited have application to the problem of standing to sue (see *infra*, p. 53). Arbitrary departure from departmental rules was sufficient to justify the Court in calling forth the extraordinary remedy of habeas corpus.

The Court in the *Germania* case also emphasized (89 Fed. at 813) that the Land Department of the United States (now the Bureau of Land Management) is a judicial tribunal, and that its substantive rules, like those of a court, have the effect of law.

Petitioner would buttress his indirect assertion of arbitrary personal power to ignore the Regulation with a single case—*Williams* v. *Wingo*, where a state legislature passed a statute granting an exception to a general statute restricting ferries. He silently infers he has exercised a similar *legislative* power here. It will suffice to ask why he has not published a new Regulation amending 193.3[36]; that is precisely what the state legislature did in the case cited—a statute was amended by a statute.

Petitioner then turns from the issue of violation or none of the Regulation and asserts a power to violate with impunity (Pet.'s Brief, 24, 25, 26)—arguing, with utter disregard of the history of the Regulation and its uniform prior construction, that it was "not directed toward protecting the competitive status of existing lessees"; and

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[36] It may be pointed out *passim*, that, in view of Congressional reenactment of the Leasing Act since publication of 193.3, and respondent's reliance, there is question of his power. *R. J. Reynolds* v. *Helvering*, 306 U. S. 110. But whether only Congress may now alter the historic Regulation is not here involved; he has not even tried to repeal or amend, but has expressly reaffirmed.

hence no lessee may complain of arbitrary violation by him. He says instead it was directed "mainly toward a policy of disposing of government coal lands in such a manner as would be to the greatest advantage of the Government as a landowner and of the people of the Nation as consumers." (Pet. Brief, p. 24.)

A sufficient answer is found right in the first departmental decision in this controversy.

> "The regulation referred to (43 CRF 193.3) was adopted *for the purpose of preventing ruinous competition in the coal industry within public land states*, and provides that leading units will be segregated and auctions authorized only upon a 'satisfactory showing that an additional coal mine is needed and there is an actual need for coal which cannot otherwise be reasonably met'." R. 59 (emphasis supplied.)

Far more eloquent are the *Cox* and *Olson* cases, just prior to the Big Horn controversy, which petitioner has conceded represent the uniform prior construction.[27]

Thus, petitioner quoted in his first *Olson* decision, Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*[28]: "Overproduction was at a point where free competition had been degraded into anarchy" and *Sunshine Anthracite Coal Co.* v. *Adkins*[29]:

> "Overproduction and savage competitive warfare wasted the *industry;* labor and *capital* alike were the victims. *Financial distress among operators* and acute poverty among miners prevailed even in periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." (Emphasis supplied.)

Petitioner went on to reaffirm the likelihood of recurrence of anarchic over-competition, and rested on the gen-

[27] Amended Complaint, First (C) R. 51.
[28] 298 U. S. 238, 330 (1936).
[29] 310 U. S. 381, 395 (1940).

eral public interest. Obviously, from the italicized portions above, this rested in no small part on the special interest of the operators in protection against anarchy.

But if this were not enough the Department rested squarely upon the welfare of the "bituminous coal industry" in *Cox*; refusing a lease to a small mine.

> "The propriety of continuing the regulation was recently examined in detail and it was concluded that repeal of the regulation would be harmful *both to the bituminous coal industry* and to the public interest. (Carl T. Olson (A. 24226), March 25, 1946, (unreported.) The application advances nothing which would warrant revision of the regulation. Because of the applicant's representation that an additional supply of coal is needed, a further field examination was made. The report of the examination discloses that lack of demand has caused abandonment of a number of mines in the vicinity. It emphasizes that there is not sufficient market to give reasonable working time to the remaining small mines and that, within a year, large shipping mines in the vicinity will be working part-time." (R. 77.)

Obviously, the protection, on the one hand, of the Federal coal lessees from anarchic over-competition and the protection, on the other hand, of the Federal coal reserves and the revenues paid by those lessees are but opposite sides of the same coin—and the coin is a healthy, sane Federal coal industry, providing coal as needed to consumers, royalty to the United States, profit to efficient lessees, and steady employment to their workers. All this, 193.3 accomplishes; 193.3 is law; without repeal, and while expressly reaffirming the Regulation, petitioner says he may disregard the Regulation and its uniform construction by him; and nobody he injures can stop him.

Petitioner's next reference to the basic issue that he has violated the Regulation is an assumption that he has disproved it:

"Even if the regulation did so provide or even if it had been so construed by the Department of the Interior . . ." (P. 28, Pet. Brief.)

He would gloss over in silence the allegation of the Amended Complaint:

"(c) That throughout the entire existence of said regulation, since the date of its promulgation over fourteen years ago, defendant and his predecessors in office have not issued a single coal mining lease without a showing and a finding of the requisite need for an additional mine under said regulation; and that even since as recently as March, September and December of 1946, he has denied several leases because the required finding could not be made. Copies of these decisions, which the defendant has conceded represent the heretofore uniform rule of all such previous decisions under said regulation, are attached hereto and made a part hereof, marked Exhibits G, H, and I." (Amended Compl. First (c) R. 51.)

The last line (as to the concession by defendant) refers to an oral request by the Court of Appeals to counsel for defendant, during an early hearing on the propriety of restraint, to produce any prior administrative decision where a coal lease had been issued since 1934 without a finding of market need. After an adjournment for the purpose, petitioner's counsel conceded the Department was unable to find any such instance in its records and that the uniform prior construction was market need or no lease, as asserted in the Amended Complaint.

Having denied the plain truth thus admitted, petitioner then says, even if *violation be admitted, respondent's objection to flagrant violation* comes within inapposite technical rules dealt with *infra*, III and IV hereof.

II. THE REGULATION IS THE LAW OF THE LAND AND HAS THE FORCE AND EFFECT OF STATUTE.

A. The Regulation Has the Force of Statute.

The Secretary of the Interior has authority under the leasing act to issue all regulations necessary and proper for carrying out his functions of creating a healthy public lands coal industry. (Appx. Pet. Br. 70.) 30 U. S. C. § 189. He is, moreover, required to govern the manner of leasing by general regulation. 30 U. S. C. 201. (Appx. Pet. Br. 65.) Pursuant to this authority and duty he issued Regulation 193.3 and caused it to be published both in the Federal Register and in the Federal Code of Regulations.

It was his statutory duty under the Administrative Procedure Act and similar statutes to publish in the Federal Code of Regulations *those of his regulations which had the force and effect of statute.* His responsible agent, the Commissioner, has stated in the preface to the land regulations, including 593.3, that they are so published in pursuance of that statutory duty.

"FOREWORD

"This pamphlet contains the *codification* of the rules and regulations assigned to Par. 193, Title 43, of the Code of Federal Regulations. No amendments thereto have been made. The regulations were codified and published *pursuant* to Section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U. S. C. Sup. 311). Part 193 contains the regulations relating to coal permits, leases, and licenses, exclusive of Alaska. • • • The Federal Register Act makes the documents which were codified and published pursuant thereto prima facie evidence of the text of such documents and of the fact that they are *in full force and effect* on and after the date of publication"

• • •

"FRED W. JOHNSON
Commissioner."
(Italics supplied)

The pertinent provisions of the Federal Register Act (44 U. S. C. Supp. §311) referred to in the Foreword follows:

> "Report by Government agencies of documents issued: publication in supplement to Register.
>
> (a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete *codification* of all documents *which, in the opinion of the agency, have general applicability and legal effect* and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938, or on the same date of every fifth year thereafter. The Committee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register."
>
> • • •
>
> "(c) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of subsection (a) hereof, as amended by documents subsequently filed with the Division, and published in the daily issues of the Federal Register, *shall be prima-facie evidence of the text of such documents and of the fact that they are in full force and effect* on and after the date of publication thereof." . . . (44 U. S. C. Sup. 311) and 5 U. S. C. 1002 and 44 U. S. C. Sup. 305) (Italics supplied.)

Thus, the Department had told the world that Regulation 193.3 had the force and effect of statute by the act of publishing it in the Federal Code with a preface referring to these statutes. The petitioner, in the District Court, for the first time anywhere, asserted that the Regulation is a mere internal declaration of policy without the force and effect of law. It must be admitted that

counsel for respondent were astonished by this turnabout on the part of petitioner. This was the more astonishing because the Department had always decided prior cases on the basis of the Regulation as a binding rule of law forbidding such leases. (*Supra*, pp. 32, 33)

The contention cannot be sustained that the regulation was a mere internal directive for the guidance of Bureau of Land Management and did not bind the Secretary of the Interior.

Moreover, it is well settled that the land regulations of the Secretary of Interior have the force and effect of statute. *Hodgson* v. *Midwest Oil Company*, 297 F. 293. See *also Germania Iron Company* v. *James*, *supra*, p. 36.

In the *Hodgson* case, the issuance of a lease to the Midwest Oil Company would have been illegal, and the leasing act unconstitutional, but for a regulation of the Secretary of the Interior. This regulation provided the constitutionally necessary notice to other possible claimants which had been omitted from the Statute.

If these regulations can shore up the Leasing Act against constitutional attack, surely they must have the effect of statute. They cannot be mere pious platitudes of internal policy or mere directives to personnel, subject to the personal whim and caprice of the occupant of the Secretary's chair, as the petitioner so eloquently contends here (Pet. Br. 21), but formerly denied uniformly in his administrative decisions (R. 71, 75, 76).

On the contrary, the Court of Appeals was manifestly correct in ruling:

> "The Regulation was published in the Federal Register as one of general applicability and legal effect. *It had the force and effect of statute.* As such, it was binding upon the Secretary *until repealed or modified by him.*" R. 104 (emphasis supplied; citation omitted).

The petitioner's sudden, novel and arbitrary contention that the regulation is mere internal directive to subordinates

can have no merit, because if that were true it would have been expressly exempt from publication. The Administrative Procedure Act requiring publication of all regulations of general applicability and legal effect contained an *exemption* from the requirement of publication for any *internal* directives to subordinates.

The Administrative Procedure Act (5 U. S. C. 1001, *et seq*) requires publication of

> "substantive rules adopted as authorized by law and statements of *general policy* or *interpretations* formulated and adopted by the agency for the *guidance of the public*," (5 U. S. C. 1002 (a) (3)). (Emphasis supplied).

In this same section there is a complete and unqualified exemption for

> "any matter relating solely to the *internal* management of an agency" (5 U. S. C. 1002 (2)). (Emphasis supplied).

Thus, if the subject matter of the regulation had been a mere internal directive, as the petitioner now contends, he would not have been required to publish it as he told the world that he was in his preface. It is to be noted that petitioner makes no claim that he published the regulation by accident, and it therefore appears that he is willing to concede that his publication was purposeful and was meant to have some meaning and effect.

B. The Regulation is Valid, and the Court of Appeals Merely Adopted Petitioner's Long-Standing Interpretation in Accordance With the Plain Meaning of its Terms and With Its History.

Petitioner (Br. p. 41) claims, with astonishing inconsistency, that the Regulation is invalid if construed in accordance with the department's uniform and frequent construction for fourteen years prior to this controversy (*supra*, 30). Cleverly, he attacks his own Regulation

under the phrase "as construed by the Court below", glossing over the fact that the Court of Appeals had every right to rely[30] upon the uniform construction alleged in the uncontroverted amended complaint, the more since he had been given an unusual opportunity to controvert it, and failed. (See *supra*, 34.) Yet the Court of Appeals has manifestly done no more than to adopt the uniform construction if the simple and unmistakable language of the *Cox* and *Olson* departmental decisions has any meaning whatever. (See *supra*, 31.)

Petitioner now urges by footnote that he has a different and valid construction. "Status as an *existing* (state) mine", though acquired subsequent to their Federal application makes Big Horn a *non-additional* mine within the meaning of the Regulation. But this attempt to confuse the issue must fail.

The words of the Regulation are not "*new* Mine", nor "*non-existing*" mine; the words of the Regulation are "*additional* mine". While in the departmental decisions "new mine" has been used as shorthand for "additional mine", no error had crept into the results such as counsel for petitioner now urges. "*Additional*" is a word of reference. "*New*" is a word of time. Thus, it is obvious that a mine which is not now "new", and has existed for a brief period is still "additional" *to the situation as it existed in 1934* which is obviously, the only frame of reference which the word additional, used in the statutory Regulation, can have. In the first place, when a man says "additional" in 1934 he patently means "added to what exists in 1934". This view is confirmed by the explanation in the letters of Secretary Ickes (R. 57) that future leases are to be made under the Regulation only for small mines needed to meet local needs. It is thus clear that Secretary Ickes contemplated in using the word "additional" that he was laying down a rule forbidding the adding of Federal mines not in existence when he laid down the Regulation.

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[30] Many of the decisions under 193.3 are unpublished and unindexed thereto in the files of the Interior Department.

Petitioner has admitted that, in 1943, "In essence a new mine was created" (R. 64). Clearly, this is additional since 1934.

Thus, it is plain that petitioner would be construing a word not in the statute, namely, "new" (or "non-existing") and would thereby reach a result that could not be reached by construing the word actually present, namely, "additional". What could be more arbitrary and capricious?

In prior cases in which a controversy has arisen over duly alleged departure from the prior departmental construction of the land laws, the Secretary has formally answered in District Court, setting up the different construction he claimed, and gone to trial thereon if necessary.

Work v. *Rives*, 267 U. S. 175.

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316.

Had not the simple truth of the prior construction respondent alleged prevented him, doubtless petitioner would have followed the orderly course of answer and spared this Court his present unseemly attempt to try this factual issue of the practice and unpublished discussions of the Department in a footnote:

> "And in a letter to the chairman of the House Committee on Public Lands dated June 9, 1947, regarding a bill to amend the Mineral Leasing Act to increase the maximum size of a coal leasing tract, the Acting Secretary, with obvious reference to this regulation, stated, 'Coal mining is and long has been a sick industry because of overproduction. For the past 15 years this Department in recognition of this fact has issued new coal leases or permits only upon a competent showing of the need for a new source of supply or *to continue an existing mine in operation*'." (Emphasis supplied; pet. Br. p. 34, footnote 9).

by quoting a single ambiguous phrase in his own mere self-serving letter, never subjected to cross-examination, *written in June 1947, after* this particular controversy had been

once decided by him departmentally. (R. 59.) Motion for rehearing was then pending before him on this very ground.

The leading Interior Department language construction cases plainly prevent petitioner from doing two things he is illegally attempting:

(1) Under the guise of "reasonable interpretation" to twist "black" to mean "white" in order to subvert the plain meaning of statutory language. *Work* v. *Mosier*, 261 U. S. 352; *Work* v. *McAlester*, 262 U. S. 200.

(2) To depart from an established and uniform *prior* contrary construction of statutory language.

The Secretary's power to construe a term of the land laws contrary to its actual and ordinary meaning has only been sustained in cases where the term itself was one of dubious meaning implying discretion—e.g., "speculative" in *Work* v. *Rives*, 267 U. S. 175. The *Rives* case itself was careful to point out the limiting principles of *Work* v. *Mosier*, 261 U. S. 352 and *Work* v. *McAlester*, 262 U. S. 200.

In *Work* v. *Mosier*, two limiting principles are enunciated.

(1) The Supreme Court pointed out that the Secretary of the Interior cannot construe "*black*" to mean "*white*". (He had endeavored to rule that "*bonuses*" for leasing oil lands were not "*royalties*" within the meaning of the statute, 261 U. S. at 357, 358); and

(2) The Secretary's "construction" of statutory criteria in a particular case *cannot depart from his long-standing contrary construction. Id.* at 360. (The Supreme Court struck down an attempt to limit royalty payments to an arbitrary monthly amount, *because they had grown very large*, where the practice had been to pay out all royalty received, under statutory direction to pay out "royalties", and required him by mandamus to carry out this ministerial duty).

Work v. *McAlester* reaffirms the established further principle that the Secretary of the Interior may not construe

language of command as language of permission. The statute ordered that, under certain fact conditions, the Secretary "shall" convey title to coal lands under his contract. He was mandamusable, the Supreme Court saying:

> "This is language of command" (262 U. S. at 208) "and brings the case within the rule of *Lane* v. *Hoglund* . . ."

Note that the language of the instant Regulation is also mandatory: "showing *required*"; "*will* . . . *only*", and has been uniformly so construed. *Supra* 30.

It would be astonishing that petitioner dignifies these leading cases only by mention of some of them in a footnote (Pet. Br. 34, footnote 9), while expounding at length upon the inapposite cases strictly construing dubious language claimed to restrict the power of *future legislatures* and to confer perpetual or otherwise unrestrictable monopolies such as *Charles River Bridge*, were it not that, as the Court of Appeals decided,[31] the cases closer to home were so uniformly and strongly against him.

But, passing over petitioner's manifest inconsistency, the Regulation, as construed, is plainly valid. All it does is to restrict leasing to a wise conservation standard—market need. Congress has delegated its plenary legislative power over the Public Lands[32] to the Secretary of the Interior only upon the explicit terms of the Statute. It has specifically empowered him to lease[33] but only in accordance with general regulations[34] published in the Federal Register[35]; and to withdraw lands from leasing.[36]

In answer to the showing thus made of the validity of the Regulation in accordance with its uniform prior construction which was adopted by the Court of Appeals,

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[31] R. 97.

[32] U. S. Const. Art. 4, Sec. 3.

[33] 30 U.S.C. 181, 201, set out at Pet. Brief 65.

[34] 30 U.S.C. 201, and 189. See *supra*.

[35] See *infra*.

[36] *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414, where the Secretary of the Interior's power to withdraw oil lands was upheld.

petitioner gives vent to three fallacies struck down by the Court of Appeals. The first is (Pet. Brief p. 42) that "power to withdraw lands does not carry with it authority to grant property interests". For this he quotes *Sioux Tribe* v. *United States*, 316 U. S. 317, ignoring that the withdrawal power of the Secretary in the instant situation must be coupled with the duty imposed by Congress of creating a healthy federal coal industry and both to govern it *by general regulation* and to issue leases *only pursuant to general regulation*.

Sheridan's property interest is created by its own lease under the Secretary's leasing and regulatory powers and not by the withdrawal power, which is cited merely to underline the broad powers of the Secretary to govern the mineral lands by general regulation.

But once he has exercised that delegated congressional power to govern by general regulation, and until he has validly repealed the general regulation in question, he is bound by it like any other citizen. Thus, petitioner's sweeping claim to a "discretion" (Pet. Br. p. 42 and 43), in his *ministerial* capacity and *not* in his *legislative* capacity, arbitrarily to ignore the Regulations he and his predecessors have made and formally promulgated in their legislative capacity, is readily unmasked as a claim to royal power to legislate and administer without distinction between the two very different functions such as the Administrative Procedure Act was expressly designed to prevent. *Wilbur* v. *United States* (Pet. Br. 42) cited by the petitioner for this remarkable claim of arbitrary power, was a case where a successor Secretary of the Interior, acting under a continuing authority to supervise rolls of an Indian tribe, reversed a determination of his predecessor that certain individuals were living as Cherokees. Its inapplicability is obvious. The plain meaning of statutory terms cannot change like the membership of an Indian tribe. The contention that a Secretary cannot bind his successors by issuing statutory regulations means, as here astonishingly

interpreted by petitioner, that every mineral leasing act regulation is automatically repealed the day a new Secretary takes office. Petitioner's entire argument here as elsewhere, depends upon the unstated premise, plainly untrue in fact, that he has endeavored to repeal the regulation.

Petitioner's next contention is resurrection of his oft-repeated fallacy that Sheridan possesses a monopoly, if the Regulation is enforced. He would overlook that he has admitted in one of his own decisions that Sheridan enjoys no monopoly[37] and that the regulation of any industry in an effort to prevent anarchic over-competition naturally and inevitably protects to some extent the market of the legitimate members of the industry. Here, as elsewhere, the entire premise of his conclusions is the silent claim that both he and the Congress have endeavored to change Reg. 193.3, when, in point of fact, both have reaffirmed it. The only thing at issue is his effort to make a single, arbitrary, and capricious "exception" in his *ministerial* capacity.

Petitioner next contrives an imaginary factual situation where either the applicant must mine the coal in question or no one will ever be able to do so, yet there is no market need for the production.

For this, there is of course absolutely no factual basis in the record. But, in any event, it is a most unlikely situation and one the remote possibility of which scarcely justifies a return to anarchic over-competition in the teeth of a formal regulation. The Regulation it seems might easily be amended to cover such a situation if one should ever arise, as it had not in fourteen years.

The weakness of the contention (Pet. Br. 40) that the statutory Regulation, as uniformly construed for fourteen years, infringes the prerogatives of Congress, is further exposed when it is considered that the Congress has repeatedly reenacted the Mineral Leasing Act[38] during the

[37] R. 67.

[38] *Infra*, 67.

long and well-published history of the Regulation. During that history, the Department wisely rejected the hardship pleas of many small, even primitive rope and shovel, miners and hewed to the line of economic sanity represented by the Regulation. It seems incredible that Congress would now be outraged if the Regulation were again applied as usual to the sizable war-baby Big Horn; on the contrary, Congress has sanctioned it, and in effect, ordered it.

III. RESPONDENT HAS A RIGHT TO PREVENT THE VIOLATION OF THIS LAW TO ITS IRREPARABLE RUIN.

The respondent has standing to sue on two separate and independent grounds and of special relationship to the law, one of property right arising from its lease, the other of regulatory status. As the Court of Appeals correctly held, Sheridan-Wyoming:

> "as possessor of a valuable right, created by contract in the presence of valid and binding restrictive regulations, has standing to sue to protect that right. The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions.
>
> The Secretary has wide discretion in the granting of federal mineral leases, but he has no discretion to violate or ignore an existing general departmental regulation which established one of the conditions upon which he entered into a contract of lease. [*Frost v. Corporation Commission, supra* note 4, and cases there cited. The proposition is much discussed in the opinions in recent cases involving radio broadcasting licenses. *Federal Communications Comm'n. v. National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943); *Scripps-Howard Radio v. Federal Communications Comm'n*, 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875 (1942); *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940).]" R. 105.

A. From Respondent's Property Rights Arising from Contract of Lease.

The first independent ground of its legal standing to challenge the illegal issuance of the Big Horn lease arises from respondent's property rights under its contract of lease.

An almost identical factual situation was present in the case of *Frost* v. *Corporation Commission*, 278 U. S. 515 (1928).

There an individual cotton ginner holding a non-exclusive license from the governmental authority sought to enjoin the arbitrary issuance of a similar license to a prospective competitor, a cooperative cotton ginning corporation, without satisfaction of a statutory "finding of market need" criterion.

The Oklahoma statute governing cotton ginning as a specially regulated industry provided generally that "the (State corporation) commission may deny a permit for the operation of a gin where there is no public necessity for it and may authorize a new ginning plant *only* after a *showing* is made that such plant is a *needed* utility. (Id. at 519) (Italics and parentheses supplied.)

A subsequent amendment to the statute required the commission to issue licenses to cooperative corporations regardless of need (id. at 518). This amendment was held to be discriminatory and the classification unreasonable. Therefore the proposed issuance of the permit was held illegal and enjoinable as denial of equal protection of the laws and due process of law under the Fourteenth Amendment. In the instant case, of course, no amendment of the regulatory law is involved; merely an arbitrary and capricious interpretative departure therefrom (the element of discrimination is fully treated at 62, *infra*).

The defendant attacked the plaintiff's standing to sue and right to invoke equity to prevent even an admittedly illegal act on the ground that an invaded property right was lacking.

This Court held (1) that the non-exclusive license of plaintiff was supported by consideration thus creating a legally protected right in the form of franchise. The Court also held (2) that the discrimination forbidden by law necessarily casts its effect on the class discriminated against rendering enjoyable at its suit both *the author* and beneficiary of the discrimination. The opinion goes on to say at page 521, *id:*

> "Appellant, having complied with all the provisions of the statute, *acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission.* While the right thus acquired does not preclude the state from making similar valid grants to others, *it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit;* in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his *property rights.* The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.
>
> "If the proviso dispensing with a showing of public necessity on the part of the Durant and similar companies is invalid as claimed, the foregoing principles afford a sufficient basis for the maintenance of the present suit, against not only the Durant Company, but the *members of the commission,* who threaten to issue a permit for the establishment of a *new* gin by that company without a *showing* of public necessity." (Italics supplied.)

In summary, the factual differences in the *Frost* case and the case at bar serve to emphasize the superior ground of the latter:

(1) In the *Frost* case, the discrimination was accomplished by statutory amendment. In the instant case, the regulation, having the force and effect of statute, is left

intact. The arbitrary discrimination is sought to be accomplished through outlandish interpretation and misuse of mere administrative power.

(2) In the *Frost* case the plaintiff had a mere franchise instead of a contract of lease containing the protecting regulation.

(3) In the *Frost* case the Constitution of the United States rendered illegal the proposed action of the governmental officer *even though authorized by statute*, while in the instant case the proposed action of the government officer finds no support in statute but, on the contrary, is rendered illegal by a regulation having the force of statute (see p. 26 *infra*.)

Nor have the *Tennessee Power* and *Alabama Power* cases, so heavily relied upon by petitioner, any relation to the wholly different factual and legal background of the present case. In *Tennessee Power* the Court was careful to point out that the whole difficulty with plaintiff's contention was that the competition complained of as not forbidden by any law or regulation aimed at the prevention of anarchic over-competition and over-production. The Court said:

> "The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. *If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution.* (Emphasis supplied) 306 U. S. at 139-140.

But the Court was careful to point out the two limiting principles within which the factual background of the present case falls. The first of these is: where the competition as such and in itself is forbidden by regulatory law aimed at preventing over-production, as here and in *Frost*, or preventing unfair competition, as in *Chicago Junction*, the legitimate competitor has a right to enjoin the acts threatening the prohibited competition. The second limiting principle, within which this case also falls, is that of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, cited with approval by this Court in *Tennessee Power Company*, at 306 U. S. 139. This was a case where a municipality had plainly granted a properly restricted monopoly to a private water company for a period of 25 years. The contract with the city contained an express means by which the city might cancel the contract for failures of the water company, just as in the cases at bar, the regulation incorporated in the lease of Sheridan permits the allowance of needed competition. But the city had endeavored to cancel the contract and compete without having recourse to the means provided, and the Court properly struck this down.

Another case cited with approval in *Tennessee Power*, at the same page, is *Superior Water and Light Company* v. *Superior*, 263 U. S. 125, in which the State of Wisconsin was prevented from arbitrarily destroying a properly restricted private water monopoly similar to the one involved in *Walla Walla*, even where formal legislative action had been taken, unlike the mere arbitrary administrative interpretation present here. The Court struck this down as violative of the obligation of contracts, the Court pointing out the importance of the prior decisions construing the basic law involved contrary to the arbitrarily novel construction now attempted in language, *mutatis mutandis*, applicable to the case at bar.

> "None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred

construes the reservation in the State Constitution as having the extraordinary scope accorded to it below; and certainly in the absence of some very clear and definite pronouncement we cannot accept the view that it then had the meaning now attributed to it." 263 U. S. at 136.

B. Under Respondent's Status as a Member of a Limited and Regulated Class, Created to Prevent Anarchic Over-Competition.

Respondent has a second independent ground of legal standing to challenge illegal issuance of the Big Horn by virtue of its status of membership in a regulated class (Federal coal lessees). This status gives it a special interest, amounting to a proprietary right, created by a statutory regulation to prevent over-competition affecting members of the class.

This second ground rests on the *Chicago Junction* case (*Baltimore & Ohio R. R.* v. *United States*, 264 U. S. 258) and related cases, notably *Federal Communications Commission* v. *National Broadcasting Company* (KOA), 319 U. S. (1943).

In *Chicago Junction*, the Baltimore & Ohio Railway sought to enjoin a competitor, the New York Central, from acquiring certain terminal facilities. Mr. Justice Brandeis spoke for the court in holding that the B. & O. had a right, arising from a general provision of the Interstate Commerce Act forbidding acquisition of terminal railroads by a single line (here New York Central), unless such acquisition (ordinarily prohibited under the statute) was proved in the public interest. On allegation that there was no evidence to support the finding of the Interstate Commerce Commission that New York Central's acquisition was in the public interest, the Court held injunction should issue at the suit of B. & O.

The language of Mr. Justice Brandeis speaking for the Court in this situation is most illuminating:

> "The Transportation Act of 1920 . . . made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier unless authorized by the Commission. By reason of this legislation, the plaintiff's being competitors of the New York Central and users of the terminal railroads therefore neutral, have a special interest in the proposal to transfer the control of that company."

In the instant case there is a regulation having the force of law which forbids the issuance of the lease in question; aside from the fact that this regulation has been expressly made a part of respondent's lease, the regulation has the force and effect of statute, and confers the protection of special interest.

Here, too, we have a general negative rule with exceptions requiring definite findings. Any member of a regulated and restricted class of industry who is damaged by a violation of a regulation has a right to protect his special interest. In the *Chicago Junction* case, any member of the class affected by the Transportation Act, who was damaged by its violation, had a right to protection irrespective of the fact that the Transportation Act conferred no express rights upon the class. Such a right is necessarily implied from general language protecting the class.

It will be recalled that this Court, in *Federal Communications Commission* v. *NBC* (KOA), 319 U.S. 239, held that interference with a "clear channel" protected by the radio regulations and granted to plaintiff in a radio license, gave plaintiff an absolute right to be heard before the Commission, notwithstanding the fact that radio licenses confer no property right. In the situation here, respondent's lease and the terms and conditions thereof are plainly a property right, so that the factual difference serves to emphasize the correctness of the holding of the Court of Appeals that this case buttresses respondent's standing to sue. This Court said, of the *Sanders* case:

> "We pointed out that while a station license was not a property right, and while the Commission was not

> bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission." 319 U. S. 247.

Again, as in the *Chicago Junction* case, *supra*, it was not the formal provision for judicial review which protected against wrongful competition, but rather the substantive statute (Federal Communications Act) which limited competition and thereby created a legal right against discriminatory allowance of "off-limits" competition.

So, too, does the *Sanders* case, cited, as we have just seen, with approval in the *KOA* case, underscore the right of Sheridan to sue in view of the superiority of the property right against wasteful and anarchic over-competition proposed by Sheridan here. For there, the regulatory law was not as it is here, primarily aimed at a situation of anarchic over-competition and intended for the protection of duly licensed competitors from the effect of anarchic over-production in a sick industry, but was aimed instead primarily at providing adequate radio broadcasting service to the public in a growing and prosperous industry.

In response to this showing of respondent's plain regulatory special interest and property right in the regulation, petitioner makes a double-barreled and doubly erroneous answer at pages 37 through 40. The main premise and the main error, however, is, as usual, petitioner's disingenuous and unsupportable assertion that the regulation was not designed as a regulation of the Public Lands Coal Industry for the purpose of preventing anarchic over-competition. Petitioner says, at page 39:

> "Here, there is no regulation of an industry . . . The regulation is based not upon any governmental power to regulate and to restrict competition in the field of public utilities but upon the authority of the United States as owner of the public domain."

As we have demonstrated *supra*, this assertion is entirely false. Moreover, it contrasts oddly with the repeated citation by petitioner, in defending the regulation in previous cases, of *Sunshine Anthracite Coal Company* v. *Adkins* and of the dissenting opinion in *Carter* v. *Carter Coal Company*, where this Court sustained the right of the federal government to prevent over-competition in the coal industry.

Petitioner's second effort to prevent enforcement of the regulation seeks to confuse the issue, whether respondent has a *special right* against anarchic over-competition, with the obvious fact that the Congress had no need to provide a *special forum* for review of decisions of the Bureau of Land Management. He impliedly urges that Congress, by its failure to provide a special forum, has implied that no private citizen should be able to enforce his property and status rights under the land and mineral laws of the United States. This overlooks history; and in the long and much litigated history of the Land Department and the Bureau of Land Management, efforts by various Secretaries of the Interior to depart from those land laws have been steadily turned aside by the courts *acting under their general equity powers*. (See pp. 79 through 84 hereof.)

Congress of course is aware that the courts have been adequately able to deal with such efforts under their normal equity powers in that time-honored line of cases.[39] Petitioner is thus actually urging that no property right and no right against arbitrary administrative discrimination can exist in the United States unless the Congress has chanced to provide special statutory review; he is saying that no rights exist under the laws of the United States except where the Congress has explicitly provided an unusual remedy. This court's recent decision in *Hynes* v. *Grimes Packing Co.*, *infra* p. 80 is a complete answer to petitioner on this point.

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[39] *Lane* v. *Hoglund*, 244 U.S. 175; *Work* v. *Mosier*, 261 U. S. 352, 360; *Santa Fe Pacific R.* v. *Fall*, 259 U.S. 197, to mention only a few.

The principle applied by this Court in *Scripps-Howard Radio* v. *Federal Communications Commission* seems entirely applicable:

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402 (b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." 316 U.S. 4, at 11.

Petitioner would ignore that in the *Frost* case, the *Chicago Junction* case, and the radio cases, this Court was first looking to determine whether a special right of the plaintiff greater than those of a mere taxpayer had been invaded, and only then was looking to the secondary question of whether injunction, mandamus or special statutory review provisions were the proper remedy; and more important, he overlooks that the Constitution itself prevents the Congress from removing the inherent power of the courts to protect property of citizens from arbitrary abuses of power by governmental officers.

IV. VIOLATION OF THE LAND LAW IS UNLAWFUL AS A PERSONAL ABUSE OF POWER AND DISREGARD OF DUTY.

A. Violation of the Statutory Regulation, as an Assault on Respondent's Status as a Member of the Limited and Regulated Class of Federal Coal Lessees, is an Unlawful Personal Abuse of Power and Disregard of Duty.

1. Violation would amount to illegal discrimination and petitioner's "construction" would violate due process.

As a member of a specially regulated and limited class, respondent cannot lawfully suffer the discrimination involved in petitioner's attempt to grant Big Horn the

special favor and privilege of exemption from Reg. 193.3. He would do this by now continuing it to deny its heretofore uniform interpretation. (See *supra*, III B, p. 58.) The construction which petition now "seeks" for the regulation (i.e., "discretion" to ignore it and refuse to apply it) would violate both the substantive and procedural due process requirement of the 5th Amendment.—*United States ex rel.* v. *Dunton*, 288 Fed. 795 (S. D. N. Y. 1923) *supra* 38.

While, of course, the equal protection clause of the Fourteenth Amendment is not specifically a part of the Fifth Amendment, rank *administrative* discrimination without a reasonable basis of classification is violative of the basic requirements of justice and fair play of the due process clause of the Fifth Amendment.[40] *Nield* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246; *O'Connor* v. *District of Columbia*, 153 F. (2d) 225, 80 App. D. C. 351; *Lappin* v. *District of Columbia*, 22 App. D. C. 68.

In *Hamilton National Bank* v. *District of Columbia*, 156 F. (2d) 843 (1946), the Assessor of the District of Columbia had interpreted a statute applying a lower rate of tax to savings banks as being applicable only to banks incorporated under state laws and not to those incorporated by acts of Congress. In other words, he had interpreted this term "savings bank" to mean "bank incorporated under state laws". The Hamilton National Bank, being incorporated by an act of Congress, was assessed at the higher rate applicable to non-savings banks. That Court held this administrative interpretation invalid in the following language:

> "The next question is whether the administrative action is so improper as to be invalid. The equal protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. *The Supreme Court has held as settled that a federal statute passed under the taxing*

[40] The 5th Amendment, Federal Constitution provides that: "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

power may be so arbitrary and capricious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment. *But we are not considering the validity of an act of Congress and need not go into the question whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter.* The matter before us is the validity of an administrative action, and the *scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which 'operates to create a rule out of harmony with the statute, is a mere nullity.'* We do not think that an administrative officer can restrict a statutory term such as 'incorporated savings bank' by a definition having no relation to savings deposits or accounts. *He cannot eliminate, by administrative definitions, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition.* His attempt to do so is invalid as not in harmony with the statute. *While, as we have said, the equal-protection clause does not apply here, the course followed by the Supreme Court in disposing of cases wherein administrative action has been held invalid because of that clause, furnishes a guide for our action here.*" (Italics supplied.)

In the case at bar, just as in the *Hamilton National Bank* case, *supra,* Regulation 193.3. (having, as we have shown, the force and effect of a statute) requires a showing of *consumer need which cannot otherwise reasonably be met.* The petitioner, acting in his administrative capacity and not under his delegation of legislative power, has endeavored to interpret "*possibility that both mines can exist*" as equivalent. This interpretation in favor of illegal competition by the Big Horn Coal Company is so rank a discrimination against the respondent that just as in

the Hamilton Bank Case it is invalid because it violates the fundamentals of justice and due process embodied in the Fifth Amendment. An officer cannot ignore the law and refuse to apply it.

In the instant case, the petitioner (then Under Secretary Chapman) has not even attempted to mask his discrimination, but reveal it, by the following three admissions:

(1) It is admitted in the first administrative decision that they will not apply the criteria of Regulation 193.3 in the instant case (R. 60).

> "In the instant case the usual criteria for determining need for a new mine under Section 193.3 do not apply . . ."

(2) It is admitted that no exception to the law of 193.3 is to be made in the future (R. 69).

> "It is also suggested that the Department's interpretation of the Regulation in its decision of July 29, 1947, will encourage evasion of the Regulation by those who will seek to extend their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn. The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal reserves."

The quote indicates that the petitioner is saying the larger the violation the more reason to allow it as an exception to the Regulation.

(3) ***They admit no exceptions to the rule of Regulation*** 193.3 ***was made in any of the previous cases which have ever arisen under the Regulation throughout its entire existence,*** inasmuch as petitioner has conceded that the two Olson and one Cox case represent all of the 40-odd published and unpublished cases which have arisen under the Regulation 193.3, F. C. R. 43,

in the Department, throughout its entire existence. (R.(c) 51)[41]

In short, an exception to the law is to be made in this one case for the great and powerful on the mere ground of bigness and strength although no exception has been made in the past and none is contemplated in the future for the small and the weak. In other words, the law is to be interpreted one way for the great and the powerful in just this one case, and another way for the small and the weak in all other cases.

As applied to the instant case, this discrimination operates in two ways against the respondent.

First, respondent like every other applicant has been required since 1934 to meet the criterion of Regulation 193,3 and to do so subsequently each time that respondent applied for a Federal lease, whereas an exception is made for the Big Horn Coal Company so it need not meet the criterion of the Regulation. Respondent will prove at trial, in support of its alleged prior construction, that the Geological Survey automatically conducts a market investigation to decide the issue of market need on all applications.

Second, petitioner has protected the other and often superior competitors of respondent against unneeded competition in each and every of the forty odd times a lease application has been contested under Regulation 193.3 in the past, by applying the criterion of the Regulation, yet he refuses to protect the respondent by applying the same criterion to Big Horn.

2. Retroactive informal "repeal" by interpretation is illegal after reenactment of the Mineral Leasing Act and reliance upon a regulation thereof.

As a member of a specially regulated class respondent has a legal right to prevent impairment of its investment

[41] At the hearing in chambers on November 28, 1947, before that court it was necessary for petitioners to concede that these three most recent 193.3 cases represent the heretofore uniform administrative interpretation of all the departmental cases (both published and unpublished) on this subject.

made in reliance upon a regulation. Petitioner cannot retroactively "repeal," by mere abortive administrative interpretation, that same regulation which he has not even attempted formally to repeal, especially when the present Mineral Leasing Act has been repeatedly reenacted since issuance of the Regulation.

Even if it be assumed that the petitioner, in the case at bar, has endeavored to exercise his legislative power delegated by the Congress under the Mineral Leasing Act (in the face of his repeated statements that the regulation is still in full force and effect, although he will not apply it here) then his action is void. The Mineral Leasing Act has been repeatedly amended since Regulation 193.3 was promulgated in 1934 including:

> The Amendment of August 8, 1946, c. 916, §1 through 13, inc., 60 Stat; the Amendment of July 13, 1946, c. 574, 60 Stat. 533; The Amendment of June 13, 1944, c. 244, 58 Stat. 275; and the Act of Nov. 28, 1943, c. 329, 57 Stat. 593.

The effect of these repeated reenactments of the Secretary's authority, without any change in the instant regulation, have the effect of freezing the regulation into the law of the land and making it impossible for the Secretary of the Interior to repeal the regulation retroactively as it affects respondent's investment.[42] *R. J. Reynolds Tobacco Co.* v. *Helvering*, 306 U.S. 110 (1939); *Helvering* v. *Griffiths*, 318 U.S. 371 (1943). In the *Reynolds* case, the Reynolds Tobacco Company, relying on a long-standing Treasury regulation and the interpretation thereof (to the effect that the profits of the company in dealing in its own shares were non-taxable) had successfully dealt in its own shares and reported the profits as non-taxable income. The Commissioner of Internal Revenue had purported to repeal this regulation both retroactively and prospectively. The Supreme Court held that the proposed retroactive appli-

[42] It should be noted that this proposition is entirely unnecessary to the correctness of the Court of Appeals' opinion.

cation of the new regulation to Reynolds' profit was invalid.

> "Since *the legislative approval of the existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law*, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed." 306 U.S. at 116 (italics supplied).

Here, the Sheridan Wyoming Coal Company has relied upon the Regulation to the extent of making heavy and continuous investment in the latest mining equipment so that additional ground is present for denying the secretary power to repeal the regulation. To do so would be a retroactive alteration of the entire background of law upon which respondent was entitled to rely and has relied in making substantial investment; and this is in the face of repeated reenactment by Congress of the Mineral Leasing Act with this regulation in full force and effect. The effect upon the entire Federal mining industry, and on respondent in particular, is a disruption of their entire legal background, similar to that described by the Supreme Court in *Helvering* v. *Griffiths*, *supra*, where dividends of stock of like kind had been made for years in reliance on the settled administrative regulations to the effect that such dividends did not constitute taxable income when received. The Court said:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of non-taxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations

of the Treasury to advise that no such liability existed." 318 U.S. 402.

So here the petitioner is attempting to depart from a regulation which in some forty decisions within the Department had been uniformly enforced to prevent the issuance of leases of the type here in question; the Congress has repeatedly reenacted the Mineral Leasing Act under the authority of which the regulation was promulgated; the petitioner and his predecessors have caused the regulation to be promulgated in the place provided by the Congress for regulations having general legal effect; and yet this Court is asked to rule that the regulation may be retroactively repealed or ignored at the whim and caprice of one man; and that without even an express acknowledgment but, on the contrary, with an express denial that he is repealing it.

The *Germania Iron* case, discussed and quoted at p. 36 *supra*, and totally ignored by petitioner in his brief, has eloquently described the outrage a citizen feels when a governmental officer claims a right to disregard the laws, their uniform prior interpretation, and the uniform long-standing practice of the Public Land Department, under which the citizen has acquired property rights in order to make a single arbitrary discrimination. Nowhere is the rule of *stare decisis* so rightfully dear to the law as in rules affecting land.

3. The land has been withdrawn for the protection of respondent's class.

As a lawful member of a specially limited and regulated class, respondent is entitled to prevent the illegal use of land withdrawn from the public domain for the express purpose of protecting the said class.

(a) *The lands which petitioner proposed to lease have been validly withdrawn from the public domain under the non-statutory authority exercised by the Executive Department some fourteen years ago.*

The public lands which the petitioner imminently threatens to lease have been long withdrawn for a broad public purpose (i.e., preventing chaos in the western public lands coal industry). The Land Department evidenced this in the excerpted letters of the Secretary of the Interior dated January 24, 1947. (Amended Complaint, Exhibits A and B, R. 57, 58). The *Olson* and *Cox* decisions also set forth the broad public policy which the Executive Department sought to enforce. It is to be noted that the first document refers to *U. S. ex rel McLennon* v. *Wilbur*, 283 U.S. 414. Withdrawal power is referred to and relied upon in connection with the action taken by Secretary Ickes. It is significant that the withdrawal exercised in the *McLennon* case was connected to the Mineral Leasing Act which construction applied to 30 U.S.C. Sec. 201 with equal force (i.e., coal as well as oil).

United States v. *Midwest Oil Company*, 236 U.S. 459 adequately defines and elucidates this principle and the power of the Secretary of the Interior to exercise the withdrawal power informally as he did fourteen years ago in this matter. Also *Stockley* v. *United States*, 271 F. 632.

This policy has had the fourteen-year acquiescence and approval of (1) the head of the Executive Department and (2) the Congress of the United States. *United States* v. *Midwest Oil Co., supra.*

The questioned leases should not issue by reason of non-statutory withdrawal.

(b) *The public lands in question have been effectively withdrawn by the Executive Department under the statutory authority of 43 U.S.C.A. 141 et seq.*

Under 43 US.C. § 141, the Executive is expressly granted power to withdraw public lands for a public purpose upon proper description of the purpose. It has been held in *Stockley* v. *United States, supra*, that the Secretary of the Interior has the power to exercise this authority. The terms of the two letters of withdrawal, Exhibits A and B

of the Complaint, meet the requisites of the statute. This action in addition to being aided by publication of Regulation 193.3, was also aided by the long standing acquiescence of both the head of the Executive Department and the Legislative Department of the Government. This action constituted an effective statutory withdrawal.

(c) *The allegation that the land had been withdrawn should have been assumed on motion to dismiss and motion for leave to amend.*

Although the complaint alleged that the lands in question had been validly withdrawn from the public domain and had not been restored thereto the District Court, originally without granting to respondent the right to produce any facts which he might have to show the land had been withdrawn, dismissed the complaint. This was erroneous. *Tahir Erk* v. *Glenn Martin Company*, 116 F. (2d) 865.

B. Violation of the Regulation, as a Legal Wrong to Respondent's Property Rights Under Its Contract of Lease, is Likewise An Unlawful Disregard of Statutory Duty.

Due to respondent's property rights under its lease, violation of Regulation 193.3 is illegal on several independent grounds as follows:

1. The regulation is a term of respondent's leases under Paragraph One.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because the Mineral Leasing Act is an *express* term of paragraph 1 of the lease and Regulation 193.3 has become part of that Act. (See *supra* 29)

Paragraph One of the lease itself specifically provides:

> "This indenture of lease (is) entered into . . . under, pursuant, and subject to the terms and the provisions

of the Act of Congress, approved February 25, 1920 (41 Stat. 437), entitled 'An Act to Promote the Mining of Coal, Phosphate, etc.'" (Mineral Leasing Act of 1920). (Amended Complaint Ex. J, R. 77)

Chapter 85, Section 32 of this Act (41 Stat. 450, 30 U.S.C. 189) provides that:

> "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to carry out and accomplish the purpose of Sections 191-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title." (The Mineral Leasing Act of 1920).

Regulations 193.3 was promulgated under this section of the Mineral Leasing Act in 1934. At the time of the execution of this lease the regulation had been in full force and effect for 9 years.

Therefore, the specific incorporation of the Mineral Leasing Act into the lease included incorporation of all regulations promulgated thereunder including 193.3. They became part of the Act by the required promulgation.

Argument of the point that a regulation issued under a statute necessarily becomes a part of that statute is set forth at pages 43-46 hereof.

2. The regulation is a term of respondent's lease under Paragraph Six.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because Reg. 193.3 is an *implied* term of paragraph 6 thereof.

1. The respondent Sheridan-Wyoming's coal lease dated September 20, 1943, provides at Section 6, page 4, as follows:

> "It is further *mutually* understood and agreed as follows . . . (6d) if the lessee shall fail to comply with the provisions of the act or make default in perform-

ance or observance of any of the terms, covenants, and stipulations hereof, or the *general regulations promulgated and enforced at date hereof*, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease provided in Section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might *otherwise have*." (Italics supplied.) (Amended Complaint, Ex. J, R. 83).

This provision by necessary implication incorporates the terms of the aforementioned Regulation 193.3 which, of course, was in force on the lease date. Such a specific reference to lessor's Regulations, even though directed to binding the lessee, must, in simple fairness, bind lessor as well on principles of mutuality of obligation in equity and certainly it reinforces the applicability of the doctrine of incorporation (of relevant laws) by operation of law. (See *infra*, p. 76)

3. Estoppel has arisen from reliance on uniform practice and usage.

Respondent, due to property rights under its contract of lease is entitled to prevent petitioner's threatened action as illegal. Petitioner's long continued custom, practice, and usage of enforcing Regulation 193.3 in the interest of his lessees estop petitioner from asserting that Reg. 193.3 is not a part of the contract of lease. Respondent has relied thereon. (Amended Complaint, par. 1(f), R. 52)

By his long established and uniform custom, practice and usage, of requiring that need be shown before he would grant a Federal coal lease, petitioner led respondent to believe that no coal lease would be granted for an unneeded mine.

Appellant was justified in relying upon this practice, since it was equally sound from the pecuniary standpoint of either party. Imagination is trained to picture a situation where the Regulation would not serve the best interests of the coal industry, the consumer, and the nation. If more

mines are needed, they are authorized; if unneeded, they are foresworn as wasteful. Moreover, the unchanging wisdom of the law has sustained the test of time. The Regulation, and its uniform interpretation, had been consistently and uniformly applied by petitioner and his predecessors since 1934 except in this single case. (See *supra*, p. 30)

Respondent, in reliance upon this sound practice, has made substantial investment over and above that required by the terms of the lease. (Amended Complaint, R. 52) Petitioner has acquiesced and reaped benefit. Thus, not only was the previous sound practice part of the consideration for respondent's investment pursuant to the contract but the same practice served as the inducement for additional voluntary investment from which petitioner has profited in the form of increased production and royalties.

Respondent's change of position has thus doubly benefited the petitioner. Estoppel, therefore, prevents alteration of the representation. Grave prejudice to respondent —i.e., having its entire business imperilled—would otherwise result.

There is a marked and obvious inconsistency between petitioner's present claim—that Reg. 193.3 means nothing; that it does not bind him, that the parties in this suit are in the same position as if it never existed—and his previous language and conduct according it the force of a statute *precluding* his issuance of any lease for an unneeded mine. (*Olson* case, R. 75) He had always represented to respondent and to the entire world by his published and widely broadcast regulations and departmental decisions that he could not grant a lease for an unneeded mine. He now makes exactly the opposite contention; that he can grant a lease to unneeded mine at his whim by inflating his discretion to cover areas he had himself previously held non-discretionary and said he was "precluded" from disturbing.

In sum, petitioner represented the Regulation was law forbidding unneeded mines. Respondent was justified in

relying, and did rely thereon, in making large investments and expenditures beyond those required by his lease; as well as in making the lease and the expenditures thereby required. Petitioner cannot now be heard to change his position.

It has long been held that the purpose of equitable estoppel is to prevent a party from denying the truth or accuracy of that which he had previously asserted, or from *assuming a position which is inconsistent with that which he had previously taken.* In other words the rule is that equitable estoppel arises where a party has been induced to alter his position, by a representation of the other, in such a way that the first party would be injured if the other party is not held to his previous representation.

In answer, petitioner asserts the circular proposition "The United States is neither bound nor estopped by the unauthorized acts of its agents in dealing with its property". Certainly, since the United States can only act by agent, it must be bound by the authorized acts of its agents; and as we have shown *supra* 43, Secretary Ickes and his successors were fully authorized to make the regulation and to adopt its uniform prior construction. The cases cited by petitioner (Pet. Br. 42) are rejections of claimed estoppels *where the government agent acted in the teeth of his authorizing statute.* In *Utah Power*[43], private oral agreements contrary to statute were claimed. In *United States* v. *San Francisco*[44], "toleration" of a practice contrary to statute was proved. These the Court properly rejected as faulty estoppels, in suits by the United States to prevent the violation of its laws, saying "the United States is neither bound nor estopped by acts of its officers in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit.*" 243 U.S. at 409, 310 U.S at 32. (Emphasis supplied)

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[43] *Utah Power & Light* v. *United States*, 243 U.S. 389, 409.

[44] 310 U.S. 16, 31-32.

But this is a far cry from saying that the agent of the government can not become equitably bound to an authorized, uniform and reasonable construction of a statute, and barred by equity from making an arbitrary departure therefrom. Cf. *R. J. Reynolds* v. *Helvering supra*, p. 67; *Work* v. *Frasier, supra*, p. 49; *Work* v. *McAlester, supra*, p. 49; *Germania Iron Co.* v. *James, supra*, p. 36.

4. Regulation 193.3 is incorporated into the respondent's lease by operation of law.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because Reg. 193.3 is a term of the lease by operation of law.

In 1934, Regulation 193.3 was issued pursuant to a delegation of legislative power to the Secretary of the Interior by the Mineral Leasing Act of 1920. It is still in full force and effect. Respondent's lease was made in 1943, a successor to previous Federal leases. (Amended Complaint, par. I(d), R. 51)

It has been settled law for generations that:

> "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."
> *Wood* v. *Lovett*, 313 U. S. 362 at 370
> *Walker* v. *Whitehead*, 83 U. S. 314
> *Antoni* v. *Greenhow*, 107 U. S. 769

In *Wood* v. *Lovett, supra*, a situation existed virtually on all fours with the present one. A 1935 Arkansas statute, in effect at the time of a tax sale, provided that the buyer's titles should be free from defects arising from technical errors in the forfeiture proceedings. The state's tax deed was quitclaim in form and made no reference to the statute; the state subsequently repealed the statute; and a former owner contended that the Act of 1935 was not a term of the tax deed from the state. The Supreme Court

held that the Act was a term of the deed by operation of law, just "as if expressly referred to or incorporated in its terms."

So, in the present case, the Regulation, having the force of statute, is a term of respondent's lease by operation of law. Moreover, here there are two important further facts in respondent's favor: The lease expressly is issued "pursuant and subject to the Mineral Leasing Act"—the parent of the Regulation, and of which the Regulation has become a part, by promulgation in the Federal Register, and by repeated reenactment of the parent. See *supra*, 66; and no repeal of the Regulation has even been attempted.

In reply to this showing, petitioner (Pet. Br. 34, 35) says that *Wood* v. *Lovett* depends upon an intent of the state to make an "offer" to purchasers at tax sales; and laboriously constructs a theory that there was no such intent on the part of Secretary Ickes to make an offer to prospective Federal coal lessees of protection from the ills of anarchic over-production. Yet it was those ills and that anarchy which Ickes and his successors have so eloquently described as their reason for establishing and continuing the regulation. It seems obvious that this security to lessees was one of the major purposes of the regulation and a certain result of its enforcement (see *supra* 30).

To support his untenable position, petitioner has recourse to another of his many inapplicable cases in which a citizen has claim that a *repealed* statute was *irrevocable* as a contract of the state.[43] It is again necessary to reiterate that the Secretary of the Interior has not attempted to repeal this regulation. The issue is simply whether he may violate it in his administrative capacity while it remains in force. Petitioner makes an extensive quotation from the Wisconsin case which clearly shows that this Court was respecting the powers of the *legislature* to

[43] *Wisconsin and Michigan Railway Company* v. *Powers*, 191 U.S. 379, Pet. Br. p. 35.

formally repeal the tax exemption statute; which exemption did not depend upon any direct bargain with the state. Such a direct bargain as the lease is here involved, like the purchase involved in *Wood*. The amended complaint recites that respondent bargained for the protection of the regulation. (Amended Complaint, First (g) R. 52)

Of course petitioner's reiterated contention (Pet. Br. p. 37) that the Court of Appeals' opinion requires the result that the regulation can never be repealed remains absurd. Neither Congress nor the Secretary of Interior have attempted repeal. Respondent has never meant to contend and does not now contend that Congress repeal the regulation. Even the question whether the Secretary can formally repeal is not involved. All the Court of Appeals held is that petitioners cannot "intolerably" and ruinously discriminate against respondent by refusing to enforce the regulation in its behalf while enforcing it in all other cases (See *supra* 46).

5. The withdrawal in support of the Regulation is incorporated in the lease by operation of law.

Respondent as a party to its contract of lease is entitled to prevent petitioner's threatened action because the withdrawal letters forbidding it are a term of the lease.

The arguments supporting this point have already been set forth under points A(3) and B(4) *supra*, covering regulatory withdrawal and incorporation by operation of law, at pages 69 and 76 hereof.

V. RESPONDENT SEEKS ONLY TO PROTECT ITS OWN LEASEHOLD PROPERTY AND LAWFUL STATUS AGAINST PETITIONER'S PERSONAL ABUSE OF UNAUTHORIZED POWER AND DISREGARD OF DUTY: THE UNITED STATES HAS NO INTEREST.

Petitioner prefaces his erroneous claim that this is a suit against the United States by remarking that the opinion of the Court of Appeals did not specifically comment[46] upon it (Pet. Br. 45). It is manifest from the record that there was no necessity for the Appellate Court doing so, both because of the District Court's original holding (R. 9, 30) and the Appelate Court's thorough discussion of respondent's standing to sue (R. 105, 106). The Court of Appeals did not have to reverse the District Court upon that point. As petitioner admits (Pet. Br. 45), the District Court at the very outset, when the matter was before Judge Holtzoff, decided in its conclusions of law (No. 5, R 30) that:

> "The United States is not a necessary party to this action."

During oral argument, the District Court, by Judge Holtzoff, in rejecting the petitioner's contrary contention, correctly stated:

> "It has been held time and time again that an action to enjoin a government officer against exceeding his authority is not a suit against the United States." (R. 9)

Indeed, the names of numerous Secretaries of the Interior appearing in the captions of a long line of personal suits against them, demonstrate that they, above all other government officers, should be well aware that personal suit is the proper remedy to prevent them from exceeding or acting contrary to their statutory authority under the

[46] The court also viewed discussion of sovereign community entirely unnecessary where a government officer was sued personally to prevent him from exceeding his statutory authority, in a recent Interior Department case, *Hynes v. Grimes Co.*, 93 L. ed. (adv.) 965 (1949). There at page 52 of the petitioning officer's brief he made the same claim as here: "The waters involved are the property of Federal Government." (Pet. Br. Oct. Term, No. 24.)

public land laws. Classic among cases where government officers have been judiciously prevented from exceeding their authority are: *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390; *Pennoyer* v. *McConnaughy* 140 U. S. 1; *Scully* v. *Bird*, 209 U. S. 481; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Payne* v. *Central Pac. R. Co.*, 255 U. S. 288; *Santa Fe Pac. R. Co.* v. *Fall*, 259 U. S. 197; *Work* v. *Louisiana*, 269 U. S. 250; *Hynes* v. *Grimes Packing Co.*, *supra*.

Next petitioner premises his entire argument on this point upon a misapprehension of the facts of this case and a consequent misapplication of numerous cases which have no bearing here.

After reciting that the United States owns the lands which petitioner is so eagerly anxious to lease to Big Horn, he dedicates himself to the proposition that:

> "A proceeding *against property* in which the United States has an interest is a suit against the United States". (Emphasis supplied)

He would thus convert respondent's defense of its own conceded leasehold property rights into an attack by respondent upon the title or interest of the United States in the public coal lands which the petitioner seeks to lease in violation of its laws.

It is self-evident from the complaint and prayer for relief (R. 51, 56) that respondent is neither "proceeding against property" nor atempting to establish any title or interest in all the unleased public lands, but only to prevent the petitioner from this lawless leasing in defiance of the statutes and regulations of the United States[47] which

[47] The recent *Hynes* decision, *supra*, struck down the attempt of an Interior Department officer to exceed his statutory authority under a void regulation. There the citizen's fishing business would have been irreparably injured by the officer's threatened action in controlling fishing waters (which concededly belonged to the United States) in such a way as to damage the fishing company. Neither the majority nor the minority opinions mentioned the far-fetched proposition that the fishing company was asserting an interest in the fishing waters of the sovereign United States by seeking relief against an officer personally who threatened to control the waters of the United States in a way which conflicted with its statutes.

control that land for the benefit of all the people, and for the benefit of the public lands coal industry in particular, not for the special privilege of Big Horn.

Respondent asserts no interest in the unleased lands of the United States; on the contrary, it asserts only its right to the full value of its own leasehold property. Respondent firmly believes that petitioner has no more right to use the public lands to destroy or diminish the value of respondent's leasehold property in violation of the laws of the United States, than petitioner would have a right to explode dynamite belonging to the government on adjacent government property, in such a way as to cave in respondent's mines, where that was forbidden by a necessary term of the mining lease.

Respondent solely endeavors to protect its rights as owner of its own lease and business against threatened action by petitioner legally established as wasteful, harmful and anarchic by the very land law from which petitioner derives all his authority, and, at the same time, derives *his definite negative duty in the premises*. It is not the Sheridan-Wyoming Coal Company that stops petitioner in his determined effort to violate these laws, but those very laws themselves.

Petitioner's argument reduced to its fallacious logic would mean that a citizen, despite either law or contract forbidding it, could never sue a government officer personally where his wrong contemplated the use of property of the United States in a way forbidden by the laws of the United States. Petitioner's fundamental logical difficulty is that he does not seem to realize that it is the coal-leasing laws of the United States which prevent his issuance of the questioned leases to Big Horn. He seems to think that he can quietly avoid discussion of the fact the land laws forbid him by erroneously attributing to respondent a claim of interest in all the public lands of the United States, which respondent has never made.

But the simple truth is far different. "Sic utere tuo ut alienum non laedas". Respondent is merely seeking protection of respondent's own property and business,

some of it acquired and existing, it is true, by contract of lease. Yet, nevertheless, the lease is respondent's own long-held property just as much as if held under some more permanent title, or acquired from someone else. Petitioner nowhere dares frankly and openly claim any ownership or interest for the United States in respondent's own leasehold during its term. Yet he would reach the same result and cloak himself in sovereign immunity to destroy the value of that lease (or at least of "one of its most valuable provisions"), by illegal, arbitrary and capricious action in the teeth of the land laws granting him his authority and establishing his duties.

Petitioner's next proposition (Pet. Br. 46) is:

> "That suit for *specific enforcement* of rights *to secure Governmental property* alleged to have arisen from contracts constitutes suits against the United States". (Emphasis supplied)

But nowhere does respondent seek "to secure government property" or proceed against it. Indeed, petitioner does not attempt to point out specifically where any governmental property is being sought by the respondent. He is content merely to imply such by the citation of inapplicable cases where that question was involved. Petitioner's next proposition (Pet. Br. 46, 47) is a gratuitous assertion that the wholly negative relief sought by the respondent against the person of the petitioner is somehow the equivalent of a suit compelling specific performance and mandatory relief from the sovereign United States.

For this he cites an enormous quantum of cases which have no application here. An examination of them will show that they stand for the proposition that mandatory relief and positive action cannot be compelled from the United States. All of these cases carry their own distinguishing limitation with respect to the class of cases referred to *supra*, where purely negative relief is enforced personally against a government officer exceeding his statutory authority. For instance, in the cases which petitioner cites, *Goldberg* v. *Daniels* requested compulsion of the

acceptance of an offer of contract upon the sovereign. *Wells* v. *Roper* sought continued acceptance of services upon the sovereign, which it may also be noted was entirely compensable in the Court of Claims. *Mine Safety Company* v. *Forrestal* sought to compel the payment of moneys out of the sovereign's treasury, although in form it was a negative challenge to the government's authority to set off renegotiation deductions. All of the other cases cited by petitioner contain similar qualifications to the effect that where no positive action (i.e. perforce) is sought to be compelled out of the soveriegn and where a government officer is invading property rights without or contrary to statutory authority and duties, the United States is not an indispensable party. Indeed is it physically impossible to compel specific performance of a negative act and where the negative relief is actually that alone, as here rather than compelling a positive act thru a prayer that is negative in form only, it is likewise physically impossible to have any specific perforce.

The recent majority opinion in *Larson*[48] cited by petitioner was most careful to distinguish from its doctrine that class of cases where injunction is sought against a government officer personally to prevent from acting in excess of his valid authority or contrary to his plain statutory duty (referred to *supra*, p. 80). The minority not only agreed with the doctrine of the cases distinguished but saw their application to the facts of *Larson*. In *Larson*, Chief Justice Vinson, for the majority, said (p. 6, pamph. op.):

> "*Where the officer's powers are limited by statute, his actions beyound these limitations are considered individual and not sovereign actions.* The officer is not doing the business which the sovereign has empowered him to do, or he is doing it in way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note in such cases the relief can be granted, without impeding the sovereign, only because of the officer's lack of delegated power." (Emphasis supplied)

[48] *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682.

The Chief Justice also quoted with approval from the *Stimson* case (at p. 7, pamph. op.); he said:

> "The rule was stated by Mr. Justice Hughes in *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 620 (1912), where he said '* * * in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments [citing cases] and it is equally applicable to a *Federal officer acting in excess of his authority* or under an authority not validly conferred.'." (Emphasis supplied)

The Chief Justice then went on to point out (p. 8, pamph. op.) that in *Larson* it was:

> "not contended by the respondent that the present case falls within either of these categories."

The Chief Justice went on to specifically limit the doctrine of the *Larson* case (p. 12, pamph. op.) in the following specific terms:

> "We hold that if the actions of an officer *do not conflict with the terms of his valid statutory authority*, then they are the actions of the sovereign, whether or not they are tortious *under general law*, if they be regarded as the actions of a private principal under the normal rules of agency." (Emphasis supplied)

Thus petitioner's threatened action, revealed as his own personal lawless act, in the teeth of the very law conferring his powers and duties, is plainly forbidden by the both the majority and minority views of the necessary limits of sovereign immunity expressed in this Court's latest and exhaustive review of that problem in *Larson* v. *Domestic and Foreign Corporation*, 337 U. S. 683.

In turn, there is *not one single action* that the United States would be required to take by the granting of the relief here requested. (R. 56). The only action that petitioner personally would be prohibited from taking would be a lawless disposition of the lands of the United

States, just as Secretary Fall and numerous other Secretaries of the Interior have been prohibited in the past.

After granting of the relief sought here, the public lands of the United States would remain freely disposable by petitioner *in accordance with the leasing laws of the United States*, just as they have always been. Never have the public lands been disposable at any unlawful and limitless discretion to grant special privileges and exemption from law to Big Horn merely because of its considerable size, "a large going concern" (R. 62). It has always been required that the public lands be leased and otherwise disposed of for the benefit of *all* the people, not the special privilege of the mighty.

Suppose petitioner arbitrarily decided to lease a range for private testing of explosives on public land adjoining Sheridan's tipple. He would doubtless then urge that an injunction against such action, certain to destroy Sheridan's tipple, was a claim of an interest in lands of the United States; he would say respondent claimed a "negative easement"; he would say Sheridan was restricting the use of lands and explosives owned by the United States; he would say Sheridan claimed specific performance of a contract of the United States not to blow up respondent's property; he would say Sheridan was depriving the United States of the rental.

VI. CONTRARY TO PETITIONER'S ASSERTION, THE COURT OF APPEALS COMMITTED NO ERROR BY INDICATING CONTINUANCE OF THE DISTRICT COURT'S PRIOR TEMPORARY RESTRAINT; THIS WAS NECESSARY TO THE PROTECTION OF ITS APPELLATE JURISDICTION.

Petitioner insists upon importing an extreme construction into the plain if abbreviated and informal language of the Court of Appeals' *opinion* on the subject of temporary restraint. The gist of petitioner's charge (Pet. Br. 55-63) is that the appellate court in its opinion indicated

that it intended, upon issuance of its mandate, to direct therein that the District Court convert its prior temporary restraint into the equivalent of a statutory preliminary injunction without the hearing and the findings necessary to the latter under Rule 65 FRCP. There are two fundamental errors in petitioner's attack.

First, a full quotation of the language used by the Court of Appeals and full quotation of the language of the District Court's temporary order referred to by the Court of Appeals, shows plainly that the Court of Appeals intended only to protect its forthcoming mandate ordering amendment of the complaint in the District Court.

Second, if the petitioner has any doubt whatever of what the Court of Appeals intends to do when it issues its mandate, he can obtain clarification from that court. *The mandate has not issued as yet.* It has been stayed by the Court of Appeals, on the motion of the petitioner, pending review here in the Supreme Court. It is impossible for anyone to predict the exact form of that mandate until it is issued. The speculations and dire predictions of petitioner are not only premature, but out of time and order, because he has made no move to avail himself of the remedy which he obviously has for his fancied injury which has not even occurred as yet.

The plain language of the District Court's temporary order and the plain language of the Court of Appeal's opinion referring to it, furnished no basis for petitioner's misapprehensions and dire predictions as the record clearly shows. The following points are very clear:

1. After the first appeal the only questions before the District Court were a motion to amend the complaint and a companion motion for preliminary injunction (R. 87).

2. The District Court on June 4, 1948 entered a temporary restraining order and injunction to protect jurisdiction until the dispositions of these motions (R. 108, 109).

3. The District Court order of July 6 1948 overruled both motions, but continued the temporary injunction for ten days in order to protect an orderly review of its action (R. 87). This same temporary order of the District Court was later continued pending appeal by the Court of Appeals (R. 92).

4. Only the order denying the motion to amend the complaint was appealed (R. 88), so that this was the only action the District Court subjected to the review of the Court of Appeals and protected by the temporary order.

5. The District Court's temporary injunction of June 4 (R. 108, 109) provided:

> "This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect *until the further order of this Court upon* the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted *then the motion for preliminary injunction shall be further heard within ten days thereafter.*" (Emphasis supplied)

It is obvious that the scope of continuance of an injunction can be no greater than the scope of the injunction continued. It is clear here that the District Court was free to make any "further order" it chose after disposition under the terms of its own injunction which the Court of Appeals continued.

6. Petitioner's argument that the Court of Appeals would attempt to change the scope of the District Court's injunction is manifestly fallacious since the Court of Appeals *continued that very same* injunction. The Court of Appeals' opinion provided:

> "The judgment of the District Court is, therefore, reversed and the case remanded with instruc-

tions to that court *to permit the filing of the proffered amended complaint* and to deny defendant's motion to dismiss *in so far as that motion rests upon the ground that plaintiff has no standing to sue.* The temporary injunction heretofore issued by *the District Court* on June 4, 1948 will be *continued* in effect until final disposition of the action by that court." (Emphasis supplied)

7. It is thus clear that the appeal dealt with amendmen of the complaint and that the Court of Appeals intended to protect its mandate ordering amendment until the amendment had finally been accomplished in accordance with the remand in the District Court. Final disposition of the action could only mean the allowance of the amendment of the complaint, and denial of dismissal on that ground because that was *all* that was under review. After that, the District Court temporary order by its own terms would automatically expire and the terms of the District Court's order would automatically give an additional ten days for further hearing on the question of a preliminary injunction.

In sum, petitioner's confusion is wholly unjustified and, even assuming *arguendo* its justification, his remedy would lie in the Court of Appeals rather than urging a supposed error here which he had not made the slightest effort even to bring to the attention of the Court of Appeals. His defense that to move to clarify the mandate would require excessive time (Pet. Br. 63, footnote 25) compared to seeking relief here, scarcely requires comment. Respondent succeeded in obtaining clarification of the earlier mandate in a few days. (R. 35, 36)

But petitioner's unsupported and erroneous assertion:

"There is *no indication that the district court is seeking to obstruct the appellate jurisdiction of the court below* and respondent has a right of appeal from any order refusing an injunction". (Pet. Br. 59)

does require comment. The District Court appeared almost deliberately obtuse and recalcitrant in refusing to permit amendment of the complaint to conform to the Court of Appeals first opinion, as the Court of Appeals indicated in its second opinion.

> "Upon the appeal, this court agreed with the District Court that merely as a member of the coal industry threatened with a new competitor, Sheridan-Wyoming had no standing to sue, citing *Alabama Power Co.* v. *Ickes* and similar cases. But Sheridan-Wyoming argued that it was a lessee of federal coal land, that the regulation mentioned (43 Code Fed. Regs § 192.3) was part of its lease, and that it thus had a property right threatened wih invasion by the proposed leases to Big Horn, relying upon *Baltimore & Ohio R. R.* v. *United States*[49] and similar cases. As to that contention, this court said:[50]
>
> > " 'The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands or indicate the nature, content or extent of any lease.'
>
> "This court, therefore, refused to consider the contention and affirmed the judgment of the District Court but in the mandate gave that court authority to entertain a motion to amend the complaint. Such a motion was presented, offering an amended complaint which contained an allegation that Sheridan-Wyoming was a lessee of federal coal lands, attaching a copy of the lease, and otherwise alleging the facts concerning the lease theretofore presented in the course of the argument in this court. The District Court denied the motion to amend, saying:
>
> > " 'It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation.'

[49] 264 U.S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[50] *Sheridan Wyoming Coal Co.* v. *Krug*, 83 U.S. App. D.C. ——, 168 F. 2d 557, 558 (1948).

"*It seems to us perfectly clear that the proposed amendment did add something new and material to the claims and issue presented by the plaintiff.* The status of one suing merely as a member of an industry to enjoin threatened competition, and the status of one claiming a property right by contract threatened with invasion, are wholly different.[51] The original complaint in the present case rested on the former status. The amended complaint rested also upon the latter. Moreover, we think this court made clear in its opinion upon the first appeal that plaintiff's rights as a member of the coal industry and its rights as owner of a property right by contract were different. We held that as the former it had no standing to sue. But we pointed out that under the *Baltimore & Ohio* and kindred cases persons claiming protection against threatened invasion of property rights, created by contract upon valid regulations, were entitled to sue.

"It is true that the language in the mandate from this court upon the first appeal was, in part: 'with leave to the District Court to dispose of such motion, if made in such manner as in its discretion seems proper'. It is elementary that a trial court has wide discretion in respect to amendments which are not of right. *But that discretion may be controlled by the opinion of this court, and the discretion mentioned in the mandate was likewise circumscribed by that opinion.* Moreover, such discretion as the trial court had, or was given, *could not deprive this court of its appellate jurisdiction over decisions of that court upon questions of law.* The Supreme Court, in *United States* v. *Lehigh Valley R. R.*,[52] had for consideration a refusal of a trial court to permit an amendment in a matter governed by the opinion of the Supreme Court in a prior appeal. *The Court held the refusal to be 'an absolute abuse of discretion' and expressed the extent of its meaning by adding 'even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.'*

"We now adhere to our original view that plaintiff's status as a lessee of federal coal lands under a lease which incorporated a valid regulation governing such

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[51] *Compare Alabama Power Co.* v. *Ickes*, *supra*, with *Frost* v. *Corporation Commission*, 278 U.S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929).

[52] 220 U.S. 257 (1911).

leases, would be materially different from its status as a mere member of the coal industry. *Since the District Court denied the motion to amend upon a contrary view of that proposition, and upon the contrary view alone, its judgment must be reversed.*" R. 97, 98; emphasis supplied.

See *supra*, "*Before Justice Letts on remand*", (p. 18).

Moreover, the Court of Appeals had twice been forced to consider and then grant restraint pending appeal denied by the District Court by sitting specially and out of normal hours, although it was patent that respondent would lose all remedy the instant restraint lapsed.[53] In the second instance, it was, to say the least strongly indicated to the District Court that the amendment offered should be allowed; and the complaint, so amended, not dismissed on the ground already held erroneous; and restraint continued pending trial of the merits, unless a showing were made of countervailing equities and damage, which of course was not done before Justice Letts. He attempted no reliance on his proper discretion in balancing the equities of restraint, but instead flew in the face of the substantive law on standing to sue as outlined by the Court of Appeals, a field in which he was without discretion.

The reasons supporting the discretionary power of an Appellate Court to grant a stay pending appeal of a difficult question where irreparable injury will occur to plaintiff if the stay is not granted were eloquently put by this Court in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S 4 at 9-10:

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[53] Once the proposed lease was issued, the Big Horn Coal Company, which was not subject to the service of process in the District of Columbia (Amended Complaint R. 56) would become a necessary party under the doctrine of *Brady* v. *Work*, 263 U.S. 435, because it would have at least a color of right to a lease actually in its possession. This the Court of Appeals knew, since petitioner was below urging that Big Horn was already a necessary party. Of course, until the lease was issued, Big Horn is not a necessary party, as both the District Court and the Court of Appeals decided, on account of the settled rule that no person can mandamus the issuance of a mineral lease of the United States. Petitioner has properly abandoned this contention now.

[2] See *supra*.

"No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. *But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.* It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U.S. 200; *In re McKenzie*, 180 U.S. 536." (Emphasis supplied)

VII. CONCLUSION.

Wherefore, respondent respectfully prays that this Court affirm the judgment of Court of Appeals.

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